Pen & Co. Pugsly

REPORTS

OF

CASES DETERMINED

BY THE

SUPREME COURT

OF

NEW BRUNSWICK,

WITH

TABLES OF THE NAMES OF THE CASES AND PRINCIPAL MATTERS.

EDITED BY

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(From Notes by JAMES HANNAY, Esq., Barrister-at-Law.)

VOL. I.

FROM HILARY TERM, 1872, TO TRINITY TERM, 1873,

BOTH INCLUSIVE.

XXXV AND XXXVI VICTORIA.

SAINT JOHN, N. B.:

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1876.

JUDGES

OF THE

SUPREME COURT OF NEW BRUNSWICK

During these Reports.

The Honorable WILLIAM JOHNSTON RITCHIE, C. J.

The Honorable JOHN CAMPBELL ALLEN,

The Honorable JOHN WESLEY WELDON,

The Honorable CHARLES FISHER,

The Honorable ANDREW RAINSFORD WETMORE.

ATTORNEY GENERAL.

The Honorable GEORGE E. KING.

TABLE OF CASES REPORTED IN THIS VOLUME.

CASES DETERMINED

BY THE

SUPREME COURT OF NEW BRUNSWICK

IN

HILARY TERM XXXV VICTORIA

McKAY *et al v.* THE COMMERCIAL BANK OF NFW BRUNSWICK.[1]

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Fraudulent Representation—Power of Bank Manager to bind Stockholders.

L. residing in St. John, drew bills of exchange on plaintiffs at Liverpool, which they accepted for the accommodation of the defendants, who agreed to guarantee the payment of them at maturity: these bills would fall due on the 2nd Sept., 1868. On the 11th August, L. drew other bills on the plaintiffs, also for the defendants' accommodation. The plaintiffs received L's letter advising the drawing of these bills on the 24th August, and not having at that time received funds from the defendants to take up the bills falling due on the 2nd September, telegraphed to L that unless those funds were sent they would not accept the bills drawn on the 11th August. At this time L had become insolvent and left the Province, having assigned his property to trustees for the benefit of his creditors. The trustees received the plaintiffs' telegram. and took it to the cashier of the Bank who knew that L. had absconded, and an answer was sent to the plaintiffs by cable. in the name of L., stating that funds had been sent by the last mail, which was the fact. In consequence of this answer the plaintiffs accepted the bills drawn on the 11th August and were obliged to pay them, L. not having shipped cargoes of lumber as he agreed. The telegram sent to the plaintiffs was in the handwriting of one of L's trustees, but was sent to the telegraph office by the cashier of the Bank, and the cost of transmitting it charged to L. in the Bank books. The cashier swore that it was sent by direction of the President of the Bank, but he, and also the Directors, denied all knowledge of it till several months afterwards, and after the cashier had become a defaulter and absconded.

Held, in an action against the Bank for falsely representing by the telegram that L. was in St. John, whereby plaintiffs were induced to accept the bills, (per ALLEN and FISHER, J J., WELDON, J. *dissentiente.*) That answering the telegram addressed to L. was not within the scope of the cashier's duties, and therefore that it should have been left to the jury to find whether the answer was sent by the authority of the Directors; and *quaere* whether the Stockholders would be liable even if the Directors had authorized it.

Per WELDON, J., That as the telegram to L. related to the payment of the bills of exchange in which the Bank was interested, the cashier had authority to answer it, and the defendants were liable for his false representation.

A witness may be asked in his examination under a commission to state the contents of a paper, without the paper being produced; but the answer will not be available on the trial unless the loss of the original is shown or a notice to produce has been given, and it thereby becomes admissible as secondary evidence.

Though a commission addressed to four commissioners or any two of them at Liverpool, England, may be irregular, because of its not appearing to be for the examination of witnesses out of the Province, the irregularity is waived by the party seeking to take advantage of it, having attended before the commssioners and cross-examined the witness, without making an objection.

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[1]Carried on appeal to the Privy Council, and judgment reversed: See L. R. 5 C. C. 394.

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This was an action for false representation, tried at the St. John Circuit, in January 1871, before WELDON, J.

The declaration stated that before and at the time of committing the grievances, the plaintiffs carried on the business of Commission and Timber Merchants, at Liverpool in England, and did in the course of such business, from time to time accept bills of exchange drawn upon them by parties resident in the Province of New Brunswick and elsewhere; that before the time, &c., one Bartlett Lingley, had carried on and been engaged in the business of shipping Timber and Lumber from New Brunswick to Liverpool, and sending such shipment to the plaintiffs for the purpose of sale, and in drawing bills of exchange upon the plaintiffs against the value of such cargoes, which bill of exchange were negotiated and sold to the defendants, the Commercial Bank, and the said Bank had from time to time made advances on account of said bills of exchange to Lingley. That before the committing of the grievances, &c., it had been agreed between the Bank and Lingley, that Lingley should draw bills of exchange from time to time on the plaintiffs for the benefit and accommodation of the Bank, and that they should guarantee the plaintiffs that if they did accept such bills, the Bank would provide them with funds to pay the bills when they became due; that in pursuance of such agreement, Lingley did from time to time draw bills of exchange on the plaintiffs for large sums of money &c., for the benefit and accommodation of the Bank, and the Bank had given to the plaintiffs guarantees and undertakings to furnish them with funds to pay such bills of exchange as they matured, and on consideration of such guarantee, and at the request of the Bank, the plaintiffs did accept such bills of exchange, and deliver them so accepted to the agents of the Bank of England. That on the 11th August, 1868, in pursuance of such arrangement and at the request of the Bank Lingley had drawn certain bills of exchange on the plaintiffs to the amount of £10,000, for the benefit and accommodation of the Bank, and had delivered them to the Bank to be forwarded for acceptance to the plaintiffs, that afterwards, on the 24th August, the last mentioned bills of exchange were presented to the plaintiffs for acceptance by the agents of the Bank; that the plaintiffs not having at that time received any moneys or funds to pay the

amount of certain acceptances of the plaintiffs falling due on the 2nd September, then next, pursuant to the guarantee and undertaking of the Bank, and accepted for their accommodation and the accommodation of Lingley, declined to accept the said bills of exchange so presented, and afterwards, on the said 24th August, despatched and forwarded by the Atlantic Telegraph Cable, a message, or telegram addressed to Lingley at St. John, in the following words:—"If not remitted guarantee two due second September, will refuse all advised eleventh," which said telegram, afterwards, on the day and year aforesaid at the City of St. John, was received and came into the possession of the defendants; and the defendants, well knowing that Lingley had left St. John, but intending to deceive the plaintiffs and to induce them by false pretence to accept the said bills of exchange so presented, and to induce the plaintiffs to believe that the message thereinafter mentioned was sent by Lingley, falsely and fraudulently forwarded by the Atlantic Telegraph Cable, a certain message purporting to be a reply to the said message sent by the plaintiffs, which message or reply was in the following words:—"Mackays, Liverpool, sent last mail, Lingley,"—and purporting to be sent by the said B. Lingley, whereas, in fact, Lingley was not then in St. John, nor ever received the said first mentioned message, or made any reply thereto, all which said premises were well known to the defendants. That the plaintiffs afterwards on the 25th August, in the year aforesaid, at Liverpool received the said telegram so sent by the defendants, and relying upon, and confiding in the truth and genuineness thereof, and believing that it had been sent by Lingley, were thereby induced to, and did accept the said bills of exchange so presented to them amounting to the sum of £20,000, which but for the receipt of the said telegram, and believing in its genuineness, they, the plaintiffs would otherwise not have done. That afterwards, on the 28th November, in the said year, when the said bills of exchange so accepted became due and payable, the plaintiffs were unable to pay the same, and the defendants did not provide the plaintiffs with funds to retire the same, but wholly neglected and refused so to do: and the plaintiffs by means thereof and by reason of accepting the said bills of exchange, were obliged to, and did suspend payment and

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compromise with their creditors, and thereby their business as merchants, and their credit and standing were greatly injured and destroyed, and they otherwise sustained great damage.

The following were the material facts of the case:—The plaintiffs were merchants, residing at Liverpool, and for several years had been in the habit of receiving shipments of deals from Bartlet Lingley, of St. John, to sell on commission—he drawing bills of exchange upon them in favor of the defendants—the Commercial Bank. During the year 1867-8 Lingley had given the Bank, accommodation exchange, drawn on the plaintiffs, the payment of which the Bank undertook to guarantee. On the 16th June, 1868, Lingley drew upon the plaintiffs, and endorsed to the Bank four bills of exchange against cargoes shipped, amounting to £5,000 and one bill for £2,000 for general account, and the Bank guaranteed the payment of them at maturity. This guarantee was sent to the plaintiffs by Lingley when he advised them of the drawing of the bills. The bills were accepted by the plaintiffs, and negotiated by the Bank through their agents, Glyn, Mills & Co., of London, and the £2,000 bill would fall due on the 2nd September. By the mail which left St. John for England on the 11th August, 1868, Lingley wrote to the plaintiffs that he had drawn upon them in favor of the Bank, seven bills of exchange, amounting to £3,750, purporting to be on account of cargoes of deals. This letter reached Liverpool on the 24th August. The bills had been sent by the Bank by the same mail, to Glyn, Mills & Co., in London, and would probably be presented to the plaintiffs for acceptance within a few days. No remittance having been sent by the mail of the 11th August to take up the bills guaranteed by the Bank on the 16th June, and falling due the 2nd September, the plaintiffs, on the 24th August, sent the following telegram to Lingley in St. John:—"If not remitted guaranteed two due second September, will refuse all advised eleventh." This telegram was received in St. John, at 10.30 a. m., on the same day. Several days before this, Lingley had become insolvent, and left the country—having assigned all his property to his brother, Lewis Lingley, and one J. Travis, in trust for the benefit of his creditors.

Lewis Lingley received the plaintiffs' telegram, took it to the

Commercial Bank and shewed it to Sancton the Cashier, who asked him to leave it for a short time. He left it at the Bank about an hour, when he called and got it again. About 12 o'clock the same day, (24th August) the messenger of the Bank, whose business it was to deliver letters, telegrams &c., took to the telegraph office, in St. John, a paper or telegraphic message, in the following words:—

"To Mackays, Liverpool,—sent last mail. LINGLEY."

This was sent by cable to the plaintiffs at Liverpool, and was received by them on the evening of the same day. This paper, sent from the Bank to the Telegraph Office, was proved to be in the handwriting of Travis, one of Lingley's trustees. The messenger stated that he got it either from the Cashier or the President of the Bank, he could not recollect which; and it was proved that the charge for sending it to Liverpool ($25) was paid at the time the paper was delivered at the Telegraph Office. This sum was charged against Lingley in the books of the Bank on that day, thus:—"Telegraph to Mackay, Liverpool, $25." The clerk who paid the money and made the entry, stated that he would not have done so without authority, and he thought it was done by the direction of Sancton.

Before, and at the time this telegram was sent to the plaintiffs, Lingley's trust-deed had been lying in the Bank, awaiting their execution, and it was executed in the afternoon of the 24th August,—a meeting of the Directors having been held on that day relative to their transactions with Lingley—he being largely indebted to the Bank. By the trust-deed, the Bank received certain property from Lingley, and released him from all liability.

The bills drawn on the plaintiffs on the 11th August were presented to them on the 25th—the day after the receipt of the telegram from St. John, and accepted by them. For two of these bills, one for £300, and the other for £1,250, no cargoes were sent, and the plaintiffs were obliged to pay them.

There was conflicting evidence whether the telegram was sent to the plaintiffs by the order of the Directors of the Bank. Mr. McLaughlin, the President at that time, said that he never authorised it, and never heard of it till about December following,

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when the plaintiffs' agent came to St. John to look after their claims against Lingley. Two of the Directors—Messrs. Seeley and Vernon—also stated the same thing. The other two Directors had died before the trial.

On the other hand, Sancton, who had become a defaulter in the Bank and left the country about the middle of November, stated, in his examination taken under a commission in New York, that he thought Messrs. Seeley and Vernon were in the cashier's room when Lingley brought the telegram to him; that his impression was, that he shewed the telegram to McLaughlin, the President; that a reply was made to it with the approval of the President; that he (Sancton) wrote the reply in consequence of instructions from the President; and he thought there was a consultation about it between the President, Seeley and Vernon—but he was not positive. He admitted on cross-examination that he had advanced to Lingley out of the funds of the Bank, $40,000 to $50,000, without the knowledge of the Directors; and that this was not known by them till after he left the country in November.

It appeared that Sancton conducted all the correspondence of the Bank, and managed all the financial matters; that all business was done through him; that he gave the directions to the clerks; and it was his duty to see that all the business was done correctly. He had full knowledge of the arrangement with Lingley about the bills of exchange, and of the guarantee to the plaintiffs, and it was his duty to forward the remittances to the plaintiffs to take up the bills guaranteed by the Bank.

It was admitted by the President, that Sancton had told him on the 24th August, that he had heard from Lewis Lingley, that the plaintiffs had informed them that unless funds were sent to take up the £2,000 bills due the 2nd September, they would not accept the bills drawn on them upon the 11th August. He says he made some answer to Sancton, but does not remember what it was. He knew then that the funds had been sent to take up the bills; and he also knew that there was not time to communicate with the plaintiffs before the 2nd September, except by telegraph.

The learned Judge directed the jury that an action of this description would lie against a Corporation; and, after reviewing the

evidence, and remarking upon the duties of Sancton, as cashier, and the manner in which the business of the Bank had been conducted by him—left the following question to the jury:—

Was the telegram to the plaintiffs, purporting to come from Lingley, delivered by the messenger of the Bank at the Telegraph office on the 24th August, sent by the Bank through the cashier or President to the plaintiffs with the intention of inducing them to accept the bills advised in Lingley's letter of the 11th August; and were those bills accepted by the plaintiffs in consequence of that telegram? If they found this in the affirmative, it was a fraud in law, which rendered the defendants liable.

The jury found this question in the affirmative, and gave a verdict for the plaintiffs for $8,488, the amount of the two bills.

In Hilary term, 1871, *S. R. Thomas, Q. C.*, obtained a rule *nisi* for a nonsuit or new trial, against which on

April 19. *A. L. Palmer, Q. C.*, and *C. W. Weldon* shewed cause. *S. R. Thomson, Q. C.*, was heard in support of the rule. *Barwick v. English Joint Stock Bank Co.;*[1] *Whitefield v. South Eastern Ry. Co.;*[2] *Godard v. Grand Trunk Ry. Co.;*[3] *Kennedy v. Panama and New Zealand and Australian Mail Co.;*[4] *Watson v. Earl of Charlement;*[5] *Udell v. Atherton;*[6] *Coleman v. Riches;*[7] *Lee v. Jones;*[8] *Hamilton v. Watson;*[9] *Cooper v. Slay;*[10] *Goff v. Great North. Ry. Co.;*[11] *Polhill v. Walter,*[12] *2 Fisher's Dig.* 4119; *Lawson v. Bank of London;*[13] *Smith v. Birmingham Gas Co.;*[14] *Maunde v. Monmouthshire Canal Co.;*[15] *Scholefield v. Templar* were cited.[16]

Cur. Adv. Vult.

The Judges now delivered the following opinions:—

WELDON, J. The learned Judge directed the jury in this case, that, in his opinion an action would lie against a Corporation such as the Bank, upon representations made by the President and

[1] L. R. 2 Ex. 259
[2] Ell. Bl. & Ell. 115.
[3] Am. Law Reg. 1871.
[4] L. R. 2 Q. B. 580.
[5] 12 Q. B. 856.
[6] 7 H. & N. 181.
[7] 16 C. B. 104.
[8] 17 C. B. N. S. 482.
[9] 12 Cl. & F. 109.
[10] 6 H. L. Cas. 746.
[11] 3 El. & El. 672.
[12] 3 B. & Ad. 114.
[13] 18 C. B. 84.
[14] 1 A. & E. 526.
[15] 4 M. & G. 452.
[16] 28 L. J. Chanc. 452.

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Cashier of the Bank, in conducting and managing the ordinary monetary affairs of the Bank, although the charter did not authorise this particular act. Yet, if it arises out of the business of the Bank, and their representations be true, and certain facts suppressed and a loss is thereby caused to parties, it is the same as if a private individual had done it. Actual fraud is something immoral and wrong; legal fraud, which is sufficient to maintain an action, when complete, is something done or something concealed or suppressed, with the intention of leading, or which does lead to the conclusion that such person will act upon it, followed by actual loss or injury. It was left to the jury to say "Was the Telegram to Mackays, purporting to come from Lingley, delivered by the messenger to the Telegraph office on the 24th August, 1868, sent by the Bank through the Cashier or President to Mackays, with the intention of inducing them to accept the bills advised in the letter of the 11th August, and were those bills accepted by Mackays in consequence of that Telegram? If you find this in the affirmative it was a fraud in law. This is for you to find. You find the fact—the question of the intention is found by you,—when that is found, I pronounce in law that fact so found is fraud—a legal fraud which renders the Bank liable." The jury found the Telegram was sent by the Bank, and the bills were accepted by the plaintiffs in consequence, believing the Telegram to come from Lingley in St. John. A verdict was given for $8,188—the amount of the two bills,—with leave to enter a nonsuit, on the ground that the action was not maintainable against the Bank.

The rule was granted as well for entering a nonsuit as for a new trial by reason of the admission of improper evidence, and misdirection. As to the admission of improper evidence, it is that of George P. Sancton, taken under a commission in New York, as to a conversation which took place between Sancton and the President of the Bank respecting the Telegram from the plaintiffs to B. Lingley, and what reply should be made to it. A reply was written—it was in the Cashier's room. The interrogatory was "will you state what you did write?" the answer was objected to. The plaintiffs on the trial, proved notice to produce the answer or paper, it being shown to be in the Bank. The defendants gave

evidence that they could not find such a telegram in the Bank. Upon this the learned Judge allowed the answer to be read. Witness says, "What I think I wrote was this; "Forwarded last mail" or "handed Lingley in time for last mail" 'or something of that kind.' It was written by directions of the President or approved of by him"—The witness was subject to a *viva voce* cross-examination by counsel for the defendants. The questions which the witness refused to answer were: "Then, if you did not under-"stand it to be a forgery, did you write it because you had authority "to do so?" Answer—"I wrote it, as before stated, by instructions. "I have no other reply to make."—Were you not a defaulter? "I decline to answer the question."

As to stating the contents of the telegram which the Cashier, Sancton, wrote and left in the Bank. Before the answer was allowed to be read, the learned Judge received evidence that the paper was not in existence, and all primary evidence exhausted. This ruling is strictly in accordance with the decision of the Court in *Wolverhampton Water Works Company v. Hawkesford.*[1] In that case there was a rule calling on the defendants to shew cause why certain interrogatories which had been disallowed by Byles, J. should not be allowed by the plaintiff to be put to the witness, to know where a paper was (describing its contents), and to know if it was executed in the presence of a certain witness. Cockburn, C. J. says, "These interrogatories may, I think, be put, "with the restriction that the answers are not to be used at the "trial without evidence proving that the subscription contract is "lost."

Williams, J. says, "As to the questions, I am not aware that "the point made has ever been before the Court hitherto. But "all objections will, I think, be obviated by making it a part of "the rule that the answers should not be available unless there "is proof at the trial that the subscription contract is lost."

Crowder, J., says, "If such evidence of loss is given on trial, I "do not see it should not be relied on as secondary evidence."

In this case, evidence is given that the paper was in the Bank. Notice is given to them to produce; they do not do so: they know nothing about it. And therefore the plaintiff may give

[1] 5 C. B. N. S. 703.

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secondary evidence of what was written in the bank, under the direction of the President or by his instructions.

I think the answer to the other question was such as the witness might be expected to give: What he did was by instructions of the President of the Bank. As to the question, whether he was not a defaulter, the witness was not bound to criminate himself. As to the several letters, put in evidence by the plaintiffs, by Lingley to the Bank in regard to the bills for the accommodation of the Bank—their approval of the terms by the signature of Sancton for the Bank as their Cashier—the sending them to the plaintiffs—the letters of the President of the Bank to Mackays, the plaintiffs—the letters from the Bank to Mackays, guaranteeing certain bills drawn by Lingley from 25th March, 1867, to October 6th, 1868, were put in evidence to shew the state of dealings between the parties, it being necessary to know how the parties stood in relation to each other, and to shew their transactions when dealing in bills of exchange and monetary transactions, in accordance with the object for which the Bank was incorporated; and also to shew that Sancton, as Cashier, did all the correspondence; and all the correspondence was in the books of the Bank; and those books were called for, to shew that the President and Directors must have approved of him as conducting the correspondence of the Bank.

An objection was made to the Commission to examine witnesses in England, it being addressed to four Commissioners or any two of them, and it not appearing it was to examine witnesses out of the province. We find that the Commission was addressed to four Commissioners, or any two "at Liverpool, England." To require the witnesses to come before them, or any two of them, is quite sufficient to designate the place where the Commission is to be executed. Certainly this was sufficient; and if any doubt could arise, it must be removed by the fact that the defendants attended by their solicitor, and examined the witnesses *viva voce*, and waived all irregularities: *Hawkins v. Baldwin*.[1] Copies of the original bill of exchange were annexed to the Commission as required by the Commission, and did not invalidate the evidence taken under it. The originals were produced before the Commissioners and at the trial. This removed any objection on that ground.

[1] 16 Q. B. 375.

Another objection was made to the 14th interrogatory and the answer given thereto. The question was, "What was the reason "of your accepting the said bills of exchange, and how came you "to do so?" The answer; "We accepted the bills after receiving "a telegram purporting to come from Lingley (marked D. M. 19) "and dated 24th August, 1868, in reply to one sent by us the "same day."

The contention of the defendants is that the question was improper, and the answer should not have been allowed in evidence. The question might have been more correctly put; but the answer is unobjectionable. The defendants had joined in the commission, and been furnished with the interrogatories by the plaintiffs; and if these were objectionable interrogatories, I see no reason why they might not have applied to a Judge before they gave their cross-interrogatories, and had the objectionable interrogatory struck out or remodelled. The answer to the interrogatories may, if improper, be rejected at the trial by the Judge. The answer to the interrogatory gives no reason, but the simple fact of having accepted the bills after receiving an answer, purporting to come from Lingley, to one sent by the plaintiffs the same day. I am of the opinion I formed at the trial, that I would not have been justified in rejecting this answer,—nor is the question so objectionable as would justify the Court in disturbing a verdict upon such technical grounds.

In *Small v. Nairne*,[1] Lord Denman, C. J., says, "As for the "objection to the evidence, I think it necessary without delay to "state our opinion that an objection to a question as too leading, "does not as a matter of law, make the answer to the question "inadmissible. It is entirely in the discretion of the Court "whether the question is such as to make the answer obtained by "it objectionable. It certainly is to be regretted that there is in "practice no opportunity for making the objection to a leading "interrogatory until the trial; but when the trial comes on and "the objection is made, I think the Judge should exercise a dis-"cretion. Here the part of the answer read to the jury was not "objectionable in itself, and was divisible from the rest."

Coleridge, J. "I was struck by Mr. Wilde's way of stating the "point that the objection to the question is allowed for no end if

[1] 13 A. & E. N. S. 842.

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"the answer be not suppressed. But the point whether a leading "question be put, and the answer to it received or not, is one on "which the Judge must exercise a discretion at the trial, and that "whether the evidence be written or *viva voce* * * *. So also "I should decline to lay down any general rule as to admitting "one part of a question and answer, and rejecting another. It "depends upon circumstances whether that may be done. I think "it was rightly done in the present case."

Wightman, J. "I am of the same opinion for the same rea-"sons. * * * But, in fact, the question and answer were "divisible, one part could be separated from the rest: therefore, "there was no reason for rejecting the whole."

The bills referred to in the letter of the 11th of August, in the hands of the agents of the defendants, notice had been given to the defendants to produce but they did not do so, nor did they inform the plaintiffs where they were when they received notice that they were in the hands of their agents. The case of *Elmer v. Ogle*,[1] is conclusive as to the ruling of the learned Judge on this point.

Parke, B., in this case says:—"If the defendant could not really cause the book to be produced, and had given notice of that fact to the plaintiff, the effort made by the plaintiff to obtain the original document would not have been sufficient, and he should then have taken further steps to subpœna the Secretary. But if nothing of the kind be said, notice to one presumably having control of the book is sufficient. And the Lord Chief Justice was therefore right in holding that evidence that the defendant could not get possession of the book from the Secretary was not receivable unless that fact was notified to the plaintiffs, either when the defendant was served with the notice to produce, or within a reasonable time thereafter."

Pollock, C. B., said: "I agree with the rest of the Court, and think it right to say so, because I consider questions on the law of evidence to be of extreme practical importance. In the case of *Sinclair v. Stevenson*, Best, C. J., thought if you receive notice to produce a document which should be in the possession of yourself or your agent, and are aware of an impediment which prevents you

[1] 15 Jur. 180.

doing so, that by not giving notice of that impediment, you acquiesce in the notice to produce." And *Gilbert v. Campbell* in our own Court also approves of the course pursued in this case.

On carefully examining the evidence in this case from the notes of the trial, the object for which it was introduced appears to be relevant and to show the course of dealing between the Bank, Lingley and the plaintiffs, and was rendered necessary in order rightly to understand how the Bank was acting, and the interest they had in connection with the Bills of Exchange remitted to England on the 11th August, and which would be presented to the plaintiffs on and after the 25th August.

The main and important objection was to the ruling of the learned Judge, and his direction to the jury, that this action would lie against the Bank, and that the matter complained of was not *ultra vires*. This brings up the whole question as to whether this action will lie against the Bank. I am of the opinion this action is maintainable, and will lie against the Bank, and that upon the ground that the act done by the Bank was incorporated with their dealing with bills of exchange; and they having adopted the telegram by sending it and paying for it, whoever may have written it, the defendants having proved in whose hand-writing it was, it was quite competent for them to have shewn, under what circumstances and how, it came to be written. The same evidence who proved the hand writing being also the party in communication with the defendants at the trial, the explanation of the whole telegram could have been given by them. It was for the defendants to remove from themselves the grounds and reasons why it was sent from the Bank. They had the means of answering and explaining how it was sent; and if they did not choose to call the person who, they proved, had written the telegram, they took the responsibility of sending it. They advanced the money to send it and charged it against Lingley as the cost of doing so, when, on the same day, the Bank had signed the trust deed discharging Lingley from all further liability on bills of exchange, and knowing Lingley had left the Province, and that he was indebted to the Bank in a very large sum. It was of importance to the Bank that the exchange sent on the 11th August should be accepted by the

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plaintiffs; and if not accepted it would increase the loss by Lingley to the extent of the Bills. This case come clearly within the rule laid down by Erle, C. J., as to Corporations being liable in *Green v. London General Omnibus Company*[1]:—"I take the whole tenor "of authorities from *Yarborough v. The Bank of England* down to "*Whitfield v. The South Eastern Railway Company* to shew that "an action for wrong lies against a corporation for a thing done "if it is within the purpose of the corporation, and it has "been done in such a manner as to constitute what would be an "actionable wrong, if done by a private individual. The doctrine "that was relied on by Mr. Gifford is rather more of a quaint than "a substantial form, that because a corporation has no soul, there-"fore it is incapable of a malicious intention. We do not in the "smallest degree interfere with prior decisions; but, on the con-"trary, there are numerous authorities of which *Yarborough v.* "*The Bank of England* (where there was a well considered and "elaborate judgment, going over all the previous cases) is by no "means the first in support of the principle on which we rely; and "I may add, as an additional reason for our decision, the incon-"venience to the public that would arise if we were to hold that "these companies, incorporated for the purpose of trade, had a "restricted limitation put upon their liability by reason of such "incorporation, and were exempt from their responsibility when "they intentionally wronged the public." It was contended that the President and Cashier might have been individually liable for sending this telegram; but that the Bank could not be made responsible for their act, though it might have induced the plaintiffs to accept the bills,—that it was not within the scope of their duties as officers of the Bank. It clearly was within the scope and duty of the Directors of the Bank to get those bills accepted; it was all important to the Bank that they should be accepted. The drawer, Bartlett Lingley, had become insolvent and left the country, and had been discharged by the Bank from all liability to the Bank. It was their duty to secure the amount to the Bank. In speaking of what is *ultra vires* in banking institutions, Selwyn, L. J., says in *Ex. parte Royal Bank of India*.[2] "But I think the answer to that

[1] 4 L. R. Ch. 262.

[2] 6 Jur. 229; 7 C. B. N. S. 790.

"is this, that such danger is necessarily involved in lending money "upon securities of this kind. Take, for instance, the common case "of banks advancing money upon the security of a ship and freight. "Nothing further would be from the notion of the Banker than "entering into a transaction respecting the sailing of a ship or "receiving the freight in respect to that ship. But, if he is obliged "to foreclose his security—if he is obliged to take possession of "that ship—then, as a prudent man, he would necessarily become "involved in the management of the sailing of the ship, and "receiving the freight as constituting the only means by which he "could recover the money he would advance."

And *Giffard,* L. J., says: "Of course, although no Bank is "authorized to become a partner with merchants, a ship owner or "builder or engage in transactions of that sort, yet he is authorized "to lend upon securities of that description, and he is authorized "to take any rational course for the purpose of making his securi-"ties good or available. In that way he may become liable upon a "building contract; in that way he may become liable as a ship "owner; in that way he may become liable in respect to matters of "freight, in fact, any matter connected with a bill of lading which "he holds as security. I entirely formed my judgment in this, "that it is within the scope of an ordinary banking business to make "loans which have been made and to take deposit of shares as "security, and where the directors have done so, and afterwards "took a reasonable and *bona fide* course to realize those securities, "they cannot now turn round, and say what they did for that "purpose was *ultra vires,* and not justified by their articles of "association."

So, here in this case, the Bank were desirous of having it communicated to the plaintiffs that funds had been forwarded to take up the bills maturing on the 2nd September, for which they had given a guarantee. It was, in truth, a fact that Lingley had done so by exchange obtained from the Bank of their agents, Glyn, Mills & Co., in London. But, which the telegram stated, that it purported to be signed by Lingley,—that is the deception complained of. The Bank knew when the telegram was sent from the bank to the telegraph office for transmission, and the charge entered in their books, that no such telegram was sent from Lingley,—that he was absent. The plaintiffs, believing Lingley was in St. John

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and had sent that answer to their telegram, accepted the bills. The benefit of such acceptances the Bank had, the loss of which had to be borne by the plaintiffs. The absence of Lingley from St. John was known to the defendants. That knowledge was in the minds of the defendants, if I may so speak, and this case is like *Barwick v. The English Joint Stock Co.*[1] The Court say:—"But with respect to the question, whether a principal is answer-"able for the act of his agent in the course of his employer's "business, and for his master's benefit, no sensible distinction "can be drawn between the case of fraud and of any other wrong."

The President and Cashier of the Bank were dealing for, and on behalf of the Bank and in the business of the Bank, and within the scope of their authority to procure the acceptance of the bills drawn upon the plaintiffs by Lingley in favor of the defendants, and referred to in the letter of the 11th of August from Lingley to the plaintiffs.

It was contended that the President and Directors were not authorized by the Company to send this telegram; but if it was done to promote the welfare of the Bank in dealing with exchange for the benefit and advantage of the Bank, and, in the manner in which it was done, it produced an injury or caused a party to act in a manner different from what they would have done but for the act of the Bank, and it produced a loss or damage to the party to whom the telegram was sent, I am unable to discover any sufficient reason why the Bank should not be held liable. Why should a corporation be less liable than an individual acting through their accredited officers? No good reason can be urged to exempt the Bank from liability for the consequence of such conduct. Then it is urged that Sancton, as Cashier, had no authority to give directions. What Sancton did is shewn by the evidence of the President, McLaughlin. He says:—"Sancton conducted all the cor-"respondence, and wrote all the telegrams. I did not write a letter "or telegram; as far as my knowledge goes he wrote them. He "Sancton, usually shewed me the telegrams. All was done through "Sancton. He gave directions to the clerks, etc., he was con-"sidered to be over the whole, and it passed under his eye; he "was to keep everything right. I did not give directions; all

[1] 2 L. R. Ex. 263.

"persons about the Bank took their orders from Sancton. I "never knew the bank charging for a telegram which they did "not send." And then there is Sancton's evidence that any telegram sent on 24th of August, 1868, was by direction of the President. The jury, from the evidence, found the telegram was sent from the Bank by the President or Sancton to the plaintiffs to induce them to accept the Bills advised of the 11th August. So that, if sent by Sancton, it was the same as if the President had sent it, and the Bank would be bound by their act. Then, it is urged the telegram is true. The funds had gone forward by way of New York. But, as Lord Chelmsford said in *Oakes v. Turquand.* "It is said that everything which is stated in the prospectus is "literally true, and so it is. But the objection to it is,—not that "it does not state the truth as far as it goes,—but that it conceals "most material facts, with which the public ought to have been "made acquainted, the very concealment of which gives to the "truth which is told, the character of falsehood." It was true of funds having gone forward; but "false" as being from Lingley; and the signature "Lingley," would represent that he was in St. John, had received the plaintiffs' telegram and answered by a telegram, when, in fact, that telegram sent to the plaintiffs, was sent by and from the Bank to the telegraph office in St. John for transmission to the plaintiffs.

Upon this point the observation of Lord Cottenham in *Ranger v. The G. W. Railway*[2] are as follows: "Strictly speaking, a cor-"poration cannot of itself be guilty of fraud. But, where a cor-"poration is formed for the purpose of carrying on a trading, or "other speculation for profit, such as forming a railway, these "objects can only be accomplished through the agency of indivi-"duals: and there can be no doubt that, if agents employed con-"duct themselves fraudulently, so that, if they had been acting "for private employers, the persons for whom they were acting "would be affected by their frauds, the same principle must prevail "where the principal, under whom the agent acts, is a corpora-"tion."

If a private person had sent a telegram to the plaintiffs with Lingley's name to it, and it had induced them to act in such a way (believing it was Lingley who sent it) as to produce or cause them

[1] L. R. 2 E. & I. Ch. App. 343.

[2] 5 H. L. Cas. 72.

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to incur a liability and consequent loss, which they would not have incurred but for that telegram, can there be a doubt but that an action would lie? And why should not a corporation be liable in the same manner when the act is done by its officers, and more particularly so when furthering the interests of the Bank in the very subject in which the Bank deals, viz: in Bills of Exchange? I am of the opinion that the Bank as a Corporation is liable, and comes clearly within the principle laid down by the Lord Chancellor in the case before referred to.

Another ground, upon which verdict is sought to be set aside, is, that the judge omitted to direct the jury that the offence sought to be made out, was a felony, and no possible authority to commit such an act could have been given to Sancton by the Directors to bind the Bank.

I am unable to discover any evidence which would justify the judge in so directing the jury or leaving any such question to the jury; nor do I discover any unlawful act of Sancton's which I could direct the jury upon. It did not appear that Sancton wrote the telegram which was sent, but the hand writing to the telegram was proved by the defendants not to be Sancton's. The plaintiffs gave no evidence of the hand-writing. They rested their case upon the fact of the telegram having been sent from the Bank. Sancton does not say he sent a telegram. What he wrote was left in the Bank; and the defendants proved that it was not in his hand writing. The telegram which the messenger took to the Bank is thus stated by the messenger:—"I was messenger of the Commercial Bank for eight years, going about with messages mostly myself. Took messages to the Telegraph. I never opened the messages. I received them from Mr. Sancton or the President. I never sent a telegram for anybody else, and paid $25 but for the Bank. I got the money from the Cashier or President, or Mr. McArthur by their direction. I don't remember getting the money. If Mr. Clinch says I paid it, I believe I did * * * the money given to me to pay for telegrams would be charged in McArthur's or Magee's Day Books. There were two tellers." The Day Book of McArthur, as Teller, was produced: 24th August, 1868:

B. Lingley, Telegraph
to Mackay, Liverpool, $25."

Mr. Clinch, the Superintendent of the Telegraph Office, says:—(producing the telegram) "This is the telegram which I saw on the 24th of August, 1868; Harrison, the Messenger of the Commerical Bank, brought it. He paid for it $25. I knew he was Messenger of the Commercial Bank. He brought the messages from the Bank; he was some years in their employ as Messenger. I received the message myself to send in the usual way. I remember receiving a message to Lingley, and receiving the answer to it." The Teller of the Bank stated he paid the money charged by him, by direction of the proper officers of the Bank—Sancton, the Cashier, or the President. It was proved by the Defendants' witnesses that the telegram was in the hand-writing of Travis, one of the Trustees of Lingley. There was nothing in this testimony which the Judge could have left to the jury to say it was felony. The plaintiffs proved the fact of the Bank having sent it to the Telegraph Office and paid for sending it to Liverpool. All the evidence left it in doubt who did really send the telegram from the Bank, the President, or Cashier. The former says he has no recollection of seeing the telegram; the latter says what he did was by directions of the President. The Defendants having shown who was the writer of the telegram, that it was not Sancton who wrote it,—and it appearing clear from the evidence to have been sent from the Bank, the onus lay upon them to explain how it came to be sent and paid for by them. The Trust Deed of Lingley's shows that the party, in whose hand-writing the telegram was, was one of his Trustees and may or may not have been authorized to sign the name of "Lingley." The charge against the Defendants is sending a telegram with Lingley's name attached, calculated to induce Mackays, the plaintiffs, to act on the faith of it, in such a way as that they incur damage,—and that damage is actually done, viz. by the Plaintiffs believing that Lingley was in St. John and had himself replied to their telegram of that day, and, so believing, accepting the bills referred to and subsequently settling with the Bank for the Bills, after the Bank had been informed by the plaintiffs that their acceptance of the said Bills of Exchange was in consequence of that telegram.

It is contended by the Defendants that the sending of the telegram was an illegal act; and that the officers of the Bank

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were only agents to do legal acts, and therefore the bank is not liable, and *Cooper v. Slade*,[1] and *Ernest v. Nicholls*[2] are quoted to sustain that position. These were actions for penalties for bribery.

I am unable to see that there was any illegality in the act done by sending this telegram. They knew that Lingley had sent the Bills to retire the Bill becoming due the 2nd of September, and they may have supposed that Travis believed he had authority to sign "Lingley," and they may, under such belief, have sent the telegram. Yet, if it was intended by such telegram, so sent by the Bank, to induce the Plaintiffs to do the act which caused them the damage, there was the deception that it caused them to believe it was Lingley who sent the telegram, and they sending it thus caused the plaintiffs to accept the Bills, which they would not have done but for that telegram, believing it had come as an answer from Lingley himself, when it had not.

It was urged that the Charter of the Bank did not authorize any of the officers to answer a telegram addressed to other persons. It may be the Charter does not authorize this particular act; but the Bank was authorized to deal in Bills of exchange,—to procure the acceptance of all Bills they might receive and remit to their agents in England, and, in the course of doing so, anything done by the President and Cashier of the Bank to procure such acceptance would be in the discharge of the duties of their situation in the Bank. And if, in so doing, they did this act, would it not be within the scope of their duties, and would not the Bank be placed in the same situation as a private person, and liable in like manner? I cannot see any distinction. The President and Cashier were, to some extent, the agents of the Bank to discharge certain duties; and if, in the discharge of those duties, they do an act which causes injury to a third party, the Bank is undoubtedly liable therefor. It is quite clear from all the authorities, that, if a private individual had done the act of which the plaintiffs complain, under similar circumstances, he would have been liable for any damage the plaintiffs might sustain in consequence thereof; and I cannot conceive that the law will permit the defendants to shelter themeslves under their charter of incorporation, and the plaintiffs be without redress.

[1] 6 H. L. Cas. 793.

[2] 6 H. L. Cas. 422.

I am therefore of the opinion that this action is maintainable against the Corporation, and the plaintiffs are entitled to retain their verdict, and that the rule ought to be discharged.

ALLEN, J. It is not disputed that an action for deceit will lie against a Municipal corporation, and, since the cases of *Whitfield v. The Southeastern Railway Co.*,[1] *Green v. The General Omnibus Company*,[2] and *Denton v. Great Northern Railroad Company*,[3] it could not well be disputed. But it is contended, 1st That the telegram was true, and therefore there can be no right of action; and 2nd That, admitting it to have been false, it was not a matter within the scope of the duties, either of the Directors of the Bank, or of the Cashier, and therefore the stockholders of the Bank cannot be held liable for the consequences of it.

As to the first objection, that the telegram was true. There is no doubt the Bank had remitted to the plaintiffs funds to take up the £2000 bills, as stated in the telegram; but the alleged false representation is in affixing Lingley's name to it, and thereby inducing the plaintiffs to believe that the answer was sent by him, when, in fact, he had become insolvent and left the country several days before the answer was sent, and the defendants knew this at the time they sent it; that, in substance, it was a representation, not merely that the funds had been remitted to take up the £2000 bills, but also that Lingley was then in St. John, and in this respect, it was false to the defendants' knowledge; and that it was calculated to, and did induce the plaintiffs to accept Lingley's bills, in consequence of which they have sustained damage. In the view which I take of this case, it is not necessary to determine whether this would amount to a false representation or not; I therefore pass on to the next objection,—namely, that the answering that telegram sent by the plaintiffs to Lingley was not a matter within the scope of the duties, either of the Directors, or of the Cashier of the Bank.

This involves another question,—whether, assuming it to have been within the duties and powers of the Directors,—Sancton, the Cashier, had any authority from them to send the telegram? And on this point the evidence was conflicting.

[1] E. B. & E. 115. [2] 7 C. Bench N. S. 790. [3] 5 E. & B. 860.

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In *Story on Agency*, §114, speaking of the authority of Cashiers of Banks, it is said:—"That as a general proposition, the officers "of a Bank are held out to the public as having authority to act "according to the general usage, practice and course of business "of such institutions, and that their acts, within the scope of such "usage, practice, and course of business, bind the bank in favor "of third persons having no knowledge to the contrary." In §115, it is said:—"But the Cashier of a Bank possesses no incidental "authority to make any declarations, binding upon the Bank, in "matters not within the scope of his ordinary duties. Thus, for "example, he has no authority to bind the Bank, upon a note "being offered for discount, by his declaration to a person about "to become an indorser, that he will incur no risk and no respon-"sibility by becoming indorser."

§134, he says:—"It may be laid down generally that no "representations, declarations or admissions of an agent will bind "his principal, except in cases within the scope of the authority "confided to him."

I cannot see how Sancton's answering a telegram addressed to Lingley, though it related to transactions in which the Bank was interested, can be said to be within the scope of the authority confided to the Cashier by the Directors, or according to the course of business of the Bank. It is true Sancton may have had authority to conduct the correspondence of the Bank, and it may have been his duty to remit the funds to the plaintiffs to take up the guaranteed bills; but it must necessarily be understood that any such correspondence must be in the name of the Bank, or in his own name as the officer of the Bank, and, when answering communications, generally only such as are addressed to the Bank. Can it be said, that answering a telegram addressed to a third person, and using the name of that person under the circumstances in which it appears to have been done in the present case, is within the scope of the ordinary duties of the Cashier of a Bank, and incidental to his authority as such? Unless it is so, this verdict cannot be sustained, because then it must depend upon whether Sancton had express authority to send the telegram, on which point his evidence was directly contradicted by McLaughlin; and this question was not left to the jury.

I think the case of *The Rayol Bank of India*[1] has no bearing on this case. I do not dispute that a Bank, for the purpose of securing a debt, may be involved in transactions in which, directly, they had no right to deal, and, as said by Lord Justice Giffard, they may take every rational course for the purpose of making their securities available. But that seems to me to be entirely outside of the present question, which is,—not whether the Bank has a right to deal in bills of exchange (which nobody will dispute), but whether they are bound by a false statement of the Cashier in answering a communication which was not addressed to the Bank, merely because it related to a transaction in which the Bank was interested. I think my brother Weldon's judgment is fallacious in assuming that the telegram was sent by the Bank, —when that is one of the principal questions in dispute.

There is no doubt that, if an agent, acting in the course of the business of his principal, makes a fraudulent representation, by which another person suffers injury, the principal is liable. In *Barwick v. The English Joint Stock Bank,*[2] there was no doubt that the contract which was entered into with the plaintiffs by the Manager of the Bank, was made in the course of his business as Manager,—so that case does not assist us any in determining the questions arising here. In *Udell v. Atherton,*[3] where the Court was equally divided upon the question, whether an innocent principal was liable in an action for deceit, for the fraudulent representation of his agent on the sale of goods,—the principal questions were, whether the agent had any authority to warrant the goods; and whether the principal, by taking the benefit of the sale, had adopted the agent's fraud. Wilde B., in that case, says:— "All deceits and frauds practised by persons who stand in the "relation of agents, general or particular, do not fall upon their "principals; for unless the fraud itself falls within the actual, or "the implied authority of the agent, it is not necessarily the fraud "of the principal."

Then, if Sancton, in sending the telegram, was not acting within the scope of his duty as Cashier, or had no express authority to send it, does the evidence show that the Directors adopted his act, and, if so, are the defendants thereby liable for his false

[1] 4 Law R. Ch. 252. [2] 2 Law R. Ex. 259. [3] 7 H. & N. 172.

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representation? There is no doubt that the Bank obtained payment from the plaintiffs of the bills of exchange which were accepted after the receipt of the telegram of the 24th of August, but I do not think there is any evidence to show that, at the time the bills were paid, the Directors had any knowledge that the telegram had been sent. No doubt the President heard on the 24th of August that the plaintiffs had sent a communication, stating that they would not accept the bills drawn on the 11th of August, unless the funds were remitted to take up the £2000 bills; but he says he only knew this as a statement said to have been made by Lewis Lingley to the Cashier; and, though he knew that there was not then time to communicate with the plaintiffs, except by telegram, before the 2nd of September, when the £2000 bills would fall due,—he might very reasonably suppose that, if the communication from the plaintiffs came to Lewis Lingley, the answer to it would be sent by him. According to Mr. McLaughlin's evidence, he never saw or heard of the telegram to the plaintiffs until December, and, if that is true, the Bank claiming payment of the bills from the plaintiffs, in the absence of all knowledge of Scanton's fraud, could certainly be no adoption of it, so as to make them liable. In *Udell v. Atherton* (*supra*), BRAMWELL and MARTIN, B. B. held that the fraudulent representation of the agent was no part of the contract of sale, but collateral to it, and that the principal might adopt and take the benefit of the sale, without being liable for the fraudulent representation, which he had not authorized his agent to make. How far those principles are applicable to the present case, it is not necessary now to consider; for, assuming that a liability of the defendants could be created in that way, I think the effect of the payment of the bills depends so much upon the knowledge which the Directors had of the sending of the telegram by Sancton (if they had any), that, until that question is found by a jury, no satisfactory conclusion could be come to. I may also remark, that no question respecting the defendants liability, by adoption, was left to the jury.

It might be sufficient to send this case to a new trial for the purpose of determining whether Sancton had authority to send the telegram; but if that should be found in the affirmative, the action would still remain, whether the Directors have any authority

to bind the stockholders by such a proceeding? And I do not wish to be understood as by any means admitting that the stockholders would be liable, even in that case; for the Directors are merely the agents of the stockholders for the management of the affairs of the Bank, and the stockholders are only liable for the acts of the Directors, done in the course of their business, and within the limits of the powers delegated to them. If they exceed their powers, the corporation, as a general rule, is not liable. See *Ernest v. Nicholls.*[1] There is no difference, in this respect, between the liability of corporations, and of natural persons, for the unauthorized acts of their agents.

As to the objections to the admissibility of evidence,—I think the most, if not the whole of them are untenable. According to the case of *The Wolverhampton Waterworks Company v. Hawkesford,*[2] the evidence given at the trial of the loss of the telegram rendered the secondary evidence of it by Sancton, in his examination under the commission, admissible.

The objections to the evidence, taken under the commission at Liverpool, if they amount to anything, are only irregularities, and are waived by the defendants attending before the Commissioners, and cross-examining the witnesses, without making any objection: *Hawkins v. Baldwin.*[3]

Perhaps the 14th and 17th interrogatories put to the plaintiff, Daniel McKay, may be somewhat irregular, but no objection appears to have been made to them at the examination; and they certainly would not be sufficient of themselves to disturb the verdict.

On the ground of misdirection, and in not leaving to the jury, whether Sancton was authorized by the Directors to send the telegram, I think there should be a new trial.

FISHER, J. I entirely concur in the opinion delivered by my brother ALLEN, and consider it unnecessary to add anything to what he has said.

RITCHIE, C. J. and WETMORE, J. took no part in this case.

Rule absolute for new trial.

The judgment in this case was reversed on appeal to the Privy Council.

[1] 6 H. Lords Cases 321.
[2] 7 C. B. N. S. 795.
[3] 16 Q. B. 375.

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KAY, PETITIONER *v.* HANINGTON, RESPONDENT.

Election to Local Legislature—32 Vic. c. 32—Bribery without knowledge and consent of Candidate—Re-election.

The election of the Respondent as a member of the Local Legislature was set aside under the "Bibery and Corruption Act, 1869," for bribery and treating by his agents—the Judge certifying that the bribery was not committed by or with the knowledge or consent of the Respondent. At an election held to fill the vacancy the Respondent was again elected.

Held, that he was not disqualified for re-election, the Act not having declared any such disqualification, except when personal bribery had been committed; and that the practice of the Imperial Parliament in such cases did not apply.

The respondent was elected a Member for the County of Westmorland, in December, 1870. A petition against his return on the ground of bribery and treating, was filed by Mr. Hebert, one of the Candidates at that election, under "The Bribery and Corruption and Election Petition Act, 1869,"[1] and on the 11th July last, the respondent's election was declared void, and was set aside, on the grounds of bribery and treating, done and committed b his agents, after the ordering of the writ of election, and before and at such election, contrary to the provisions of the Act; and the presiding Judge thereupon certified the same to the Speaker of the House of Assembly, reporting also, under the authority given by the Act, "that such bribery was not committed by or with the knowledge and consent of the said Daniel L. Hanington."

In consequence of this certificate, a new writ for the election of a member for the county of Westmorland, in place of the respondent, was issued on the 16th August last, pursuant to the 24th section of the Act. The election was held under that writ on the 8th Spetember last, when the Petitioner, the Respondent, and one Charles Ward were nominated as candidates—the Petitioner having read, and filed with the Sheriff, a protest against the nomination of the respondent, on the ground that he was ineligible to be nominated or elected, in consequence of his seat having been vacated for bribery and treating by the judgment. The respondent received the majority of votes, and was declared by the Sheriff duly elected,—the petitioner again petitioning against his right to be elected, for the reasons before stated.

A petition was presented against this last return, claiming that

[1] 32 Vic. c. 32.

by force of the judgment and determination of the Judge in the case of *Hebert v. Hanington,* the respondent was, and is disqualified and incapable of being a candidate, and of being elected to fill the vacancy. The case was tried, and the above facts substantially proved, and the questions of law arising upon the evidence were reserved by the learned Judge for the opinion of this Court, under the 22nd section of the Act.

Feb. 15, 1872. *Morrison,* for the Petitioner.

A. L. Palmer, Q. C., for the Respondent.

The arguments are fully noticed in the judgments of the Court.

Cur. Adv. Vult.

Feb. 24. The Judges now delivered the following judgments:

RITCHIE, C. J. This matter comes before us on a case reserved by our brother ALLAN under the provisions of the 22nd section of the 32 Vict, cap. 32.

The simple question for our consideration is this:—Is a candidate, who has been unseated by reason of bribery by his agents, without his knewledge, capable of being elected to a seat in the House of Assembly at an election held to fill the vacancy occasioned by reason of his having been so unseated?

The 32 Vict. c. 32, which gives us jurisdiction over this matter, by Sect. 3 declares what acts done by a candidate, either directly or indirectly, by himself or by any other person on his behalf, whether specially authorized for such purpose, or authorized generally to act in procuring his election, shall be deemed bribery and treating, and affixes as a consequence or penalty, this disqualification; "he is thereby declared to be incapable of sitting or voting in the House of Assembly as a member returned *at such election, and such election and return shall be void and be set aside.*" And section 59, entitled, "Punishment of Bribery," enacts that, "Where it is found by the Report of the Judge upon an election Petition under the Act, that Bribery has been committed *by or with both the knowledge and consent of any person* returned as a Member at an election, such person shall be deemed to have personally committed Bribery at such election; and, in addition to his Election being declared void, he shall, during the period

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of six years next after the date of the said Report, be incapable of being elected to, and of sitting in, the House of Assembly;" and he shall further be incapable, during the said period,—(1) Of being registered as a voter and voting at an election in the Province for a member of the House of Assembly; (2) Of holding any appointment or commission or office under the authority and control of the Lieutenant-Governor in Council. And section 60 enacts, that, "nothing herein contained shall be taken to relieve any person from any of the penalties imposed *by any other Act or Acts* in respect of Bribery, except so far as relates to the debarring of such person from voting at any election."

It has been strongly contended before us, that the Election declared void, and the Election to fill the vacancy occasioned thereby are one and the same election,—that immediately on a Candidate being unseated for bribery by his agents, though without his knowledge, not only the Acts of Assembly apply, but the common law, or law of Parliament likewise applies; and that decisions under the latter clearly establish that, in England, the party unseated, as the Respondent was, could not be returned at the Election occasioned by the election being so avoided.

The Act of 32 Vic. cap. 32, I think, treats the election caused by the decision of the Judge as a proceeding entirely distinct from, and unconnected with, that declared void. Thus, by section 24, the Speaker, on receipt of the certificate of the Court or Judge, in case the election is declared void, shall forthwith send "his Warrant to the Provincial Secretary, to issue a Writ for the Election of a Member to *fill the vacancy* which is hereby declared to be thereby occasioned;" and in section 25, in the event of the certificate being received during the sitting of the House, the House, in case the election is declared void, "shall give the necessary direction for issuing *a Writ for a new Election.*" In considering the objections raised, the question immediately suggests itself,—if the disqualification under section 3 was to extend further and to the extent contended for, why was not the provision added (by *express* words) and the party unseated declared "likewise incapable of being elected at the new Election caused by the vacancy?" And, if there were to be other penalties or disqualifications not provided for in any Act of Assemlby, why, after

the words other "Act or Acts" in section 60, were not the words added "or by the common law, or law of Parliament, as heretofore administered in England, (if, as is contended, such is the law)?"

In considering this Bribery question, I think we must be regulated by our own Acts of Assembly regulating controverted Elections, and passed for the prevention of Bribery and Corruption at the Election of members to serve in the General Assembly; and where we find provisions expressly made to meet the exigencies of any particular case, and disqualifications, disabilities and penalties clearly defined and imposed we must be governed by the law thus enacted, and not, without express authority, impose other, or greater, additional restrictions or penalties,—that we must be governed by our own legislative enactment, rather than by the common law or law of Parliament of Great Britain (assuming such to have been in force in this Province and to be different from the provincial statutory provisions). If such should be the case, which we are not called on to affirm or disaffirm, we must conclude that the Provincial Legislature intended its own provisions to be in substitution and lieu thereof.

The object of the Legislature, as declared by the preamble of the 32 Vic., was to "provide more affectually for the prevention of Bribery and Corruption at the Election of Members to serve in General Assembly," and we may presume that the Legislature deemed all necessary provisions were enacted to accomplish that purpose in the 32 Vic., or the Act or Acts referred to in the 60th section.

I cannot think that it was the intention of the Legislature that any other or greater disqualifications, or additional disabilities or penalties, should be imposed for any offences provided against by the Act, than are therein prescribed. Had such been the design of the Legislature, I think there would have been an express enactment to that effect. I am not aware of any case ever having arisen, either in this or the adjoining provinces, where the rule of the common law or law of Parliament, as contended for in this case, has ever been practically applied, or its existence, as being in force, recognized by any legislative or judicial authority; and I do not think that, in view of the state of the legislation of this

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Province on the subject, we would be justified in now adopting what, to say the best of it, could be but a doubtfully established precedent.

On the other hand, if we have misapprehended the Legislature, a similar error can be very easily guarded against for the future, by amending the Act in such a way as to remove the possibility of any doubt or misunderstanding on the subject.

ALLEN, J. It is contended in this case, 1st. That, the first election of the respondent having been set aside for bribery, he is disqualified from re-election, by common law; 2nd. That he is disqualified under the Act, 32 Vic. c. 32; 3rd. That he is disqualified under the Act, 18 Vic. c. 37, § 51.

It seems quite clear that, according to the law and practice of Parliament, a person who has been unseated for bribery is not eligible for re-election to fill the vacant seat; and that, until the seat, which has been declared vacant, by reason for bribery, has been effectually filled, the person offending continues disqualified:

1 *Roe Elect.* 142; *Wordsworth Elect.* 83; *Clerk Elect.* 169, 195, and this appears to be the rule, even though the candidate has been acquitted of any personal cognizance of the corrupt proceedings. *Clerk Elect. Comm.* 166. The principle of the rule is, that the second election is looked upon as a continuation of, and forming part of the first—the whole proceeding forming but one election.

It is unnecessary to consider how far the decision of Election Committees of the House of Commons should guide us, in the absence of any legislation on the subject; because I think the Act 32 Vic. c. 32 § 59 having expressly declared under what circumstances a person, whose election has been set aside, shall be incapable of re-election—namely, where he has been guilty of personal bribery—it must be taken to have been the intention of the Legislature, that where there was no personal guilt, the candidate is not disqualified for re-election.

The 3rd Section of the Act declares that "every person who shall after the ordering of a writ for any election, either directly or indirectly by himself, or by any other person on his behalf, whether specially authorized for such purpose, or authorized

generally to act in procuring his election, give, allow, or offer, or promise to give, allow, or procure to or for any elector, any money, present, gift, loan, valuable consideration, reward, office, employment or provision, being other than in the nature of refreshment, to or for the use of any person in order to procure the election of any person or to procure any elector to vote or refrain from voting at such election, shall be deemed to have committed bribery under this Act, so as that he shall be incapable, and he is hereby declared to be incapable of sitting or voting in the House of Assembly as a member returned at such election, and such election and return shall be void, and be set aside."

It then makes similar provisions against treating, for the purpose of influencing any person to vote, or refrain from voting.

The 21 Section requires the Judge, at the time he certifies his determination of the case to the Speaker, to report to him whether bribery has been committed by or with both the knowledge and consent of the Member.

The 59th Section enacts, that "where it is found by the report of the Judge upon an Election Petition under this Act, that bribery has been committed by or with both the knowledge and consent of any person returned as a member at an election, such person shall be deemed to have personally committed bribery at such election, and in addition to his election being declared void, he shall during the period of six years next after the date of said report, be incapable of being elected to, and of sitting in the House of Assembly;" and he shall further be incapable during that period, (1) Of being registered as a voter, and voting at an election for a member of the House of Assembly. (2) Of holding any appointment or commission or office under the authority and control of the Lieutenant-Governor in Council. Under this act, bribery and treating of any description, are punished by the loss of the seat, and the election is set aside; but where the candidate has been personally corrupt, where the bribery was with his knowledge and consent, *"in addition to his election being void,"* he is declared to be incapable of being elected for a period of six years, besides the disqualifications. Surely then, when the Legislature has affixed such a serious punishment to the offence of personal bribery, and has not declared that any disqualification,

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beyond the setting aside of the election, should attach to bribery committed without the knowledge and consent of the candidate, it must be presumed that they did not intend that he should suffer any other punishment in such cases.

The words—"in addition to his election being declared void"—seem to me to show, beyond doubt, that the avoidance of the election was the only punishment intended, where personal bribery was not proved.

Secondly, it is contended that the words "such election" in the third section of the Act should not be construed to mean the election at which the bribery took place, but any election held to fill the seat vacated in consequence of such bribery; and in support of this, *Clerk on Elect.* 197, was cited, where such a construction is said to have been put upon those words in the statute 7 Wm. 3, c. 4. It is doubted, however, by the author, whether the interpretation of the words is correct, and whether it does not depend, rather upon the common law of Parliament, than upon the legal interpretation of the words. It seems to me to be a very forced and unnatural construction, and one which I should not be disposed to adopt upon the mere decision of an Election Committee. The words of our Act (after stating that in certain cases the Member shall be deemed to have committed bribery,) are, that he shall be incapable of sitting or voting in the House of Assembly as a Member returned *"at such election."* Which election is referred to? Why, surely the election in which he is charged to have committed bribery. The Act thus proceeds "and *such* election and return shall be void and be set aside." If these words are to be construed in their grammatical and natural sense, how can they apply to any election except that at which the bribery took place?

The third objection is, that the respondent is disqualified by the Act 18 Vict. c. 37, § 51; and it is said that this is clear from the 60th section of the Act 32 Vict., c. 32, which declares that "nothing therein contained shall be taken to relieve any person from any of the penalties imposed by any other Act or Acts in respect of bribery; except so far as relates to the debarring of such person from voting at any election."

The 51st section of the 18th Vict. enacts, that "whoever, after

the ordering of the writ for any election, shall directly or indirectly give or allow to any elector any money, meat, drink, entertainment, or provision, or make any present, gift, reward or entertainment, or make any promise or engagement to give or allow any money, meat, drink, provision, reward or entertainment to or for any person or place, or the use or benefit of any person or place in order to be elected, or for being elected for such place, shall be incapable of sitting or voting in the House of Assembly." This section appears to have been intended to express the substance of the 42nd and 43rd sections of the 11 Vict. c. 65, which are almost identical with the words of the stat. 7 Wm. 3 c. 4.

No part of the Act of 18 Vict., c. 37 is in terms repealed by the 32 Vict., c. 32, but there certainly is, to my mind, some difficulty in reconciling the 51st section of the former Act, with the 59th section of the latter. Under the 18 Vict. the disqualification for bribery would seem to be perpetual, though a different construction has been given in England to the statute of 7 Wm. 3, which has been held only to disqualify the person from serving in the existing Parliament: 1 *Roe Elect.* 148.

Whatever may be the true construction of the 51st section of the 18th Vict. (admitting it to be in force), I think it only applies to cases of personal bribery, where the acts are done by the desire, or with the privity of the candidate: *Hughes v. Marshall,*[1] and, cannot therefore, apply to this case.

Where the consequences are highly penal, as they certainly are under the 18 Vict., it ought to be clear, beyond a reasonable doubt that the case comes within the words of that Act before a person is made liable to the penalties. As the Act of 32 Vict. has imposed certain disqualifications upon persons found to have committed bribery, either personally, or by their agents without their knowledge and consent, I think we ought not to go outside of that Act, and impose other disqualifications and penalties, unless we are clearly satisfied that such was the intention of the Legislature.

For these reasons, I think the Petitioner has failed to make out that the respondent was disqualified by law from being re-elected.

WELDON, J. I am of the same opinion.

[1] 2 C. & J. 118.

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FISHER, J. In the argument in this case, numerous authorities were referred to and decisions of committees of the House of Commons, as well as the opinions of eminent text writers, to shew what was bribery by the common law, and the law or custom of parliament, as also the Act of the Imperial Parliament of Wm. 3, c. 4. I am unable to discover that the common law, or what, in England is called the law and custom of Parliament, or any Act of the Imperial Parliament have anything whatever to do with the question. In 1855 an Act was passed to regulate the election of Members to serve in the General Assembly—18 Vic., c. 37. The 59th section of this Act disqualified a person guilty of the bribery therein defined from sitting in the House of Assembly. So far as I can discover from reference to former Acts, this provision has been incorporated in the different Acts relating to elections passed in this province, and the latter contain substantially all the provisions relating to bribery in the former Act. The Revised Statutes, Title xix, c. 98, provided for the trial of controverted elections, and was copied from the Granville Act (so called), which in England was passed to supersede the old mode of trial by the House of Commons, which was very inconvenient and dilatory.

Controverted elections continued to be tried in England by committees of the House until 1868, when the "Parliamentary Election Act, 1868" was passed to transfer the trial to the Judges of the Court of Common Pleas. The trial of election petitions was so transferred because there was little, or no confidence in the Committees, and, whether they were fairly open to the charge or not, their decisions were generally supposed to be influenced more by considerations of party, than a regard for the rights of the contestant.

Our Act 32 Vic. c. 32 was mostly copied from that Act, and is intituled "An Act to provide more effectually for the prevention of bribery and corruption at the election of members to serve in the General Assembly, and for the more effectual trial of election petitions." The preamble states plainly the object of the Act, and its meaning is to my mind perfectly plain. In its enactment, the Legislature intended that it should prescribe what bribery and treating were, the mode of trial of a member charged with the commission of the offence, and the punishment. This appears to me, in effect, virtually to repeal § 51 of the Act of 18 Vic.

The third section enacts that bribery, as therein defined, committed by the agent or agents of any candidate shall vitiate the election, and it shall be set aside. It makes similar provision with regard to treating.

In either case, no incapacity attaches to the candidate, save only that, when there has been bribery or treating, the election is deemed to be so contaminated thereby that it is set aside.

The 59th section advances a step further, and enacts that, if the bribery has been committed with the knowledge and consent of any person returned as a member, he shall be deemed personally to have committed bribery, and, in addition to the election being declared void, shall be incapable of holding a seat in the Assembly for six years. In the one case, the election is set aside, when bribery is committed by the Agent of a member returned, and in the other, when it has been committed with his knowledge and consent, the election is set aside, and he is incapacitated from sitting in the Assembly for six years.

In the case of the respondent, the learned Judge who tried the election petition expressly certified that the Bribery, for which the election was set aside, was not committed with his knowledge or consent. It was urged that both elections were one and the same. Such a proposition is, I think, inconsistent with both reason and law. The reasoning of the counsel for the Petitioner, if I understand it, led to the conclusion that the Respondent could not be elected to fill the seat vacated by the bribery of his agent, while he could be elected for the same County to fill a subsequent vacancy. How such a result would promote the purity of elections, which, I assume, was the primary object of "the Bribery and Corruption and Election Petition Act of 1869," I am unable to discover.

I am, theferore, of opinion that the question must be determined by the plain meaning of the Act of 1869, which must govern it; and by that Act, no incapacity attaches to the Respondent by reason of the act of the agent, committed without his knowledge and consent.

WETMORE, J., took no part in this case.

Judgment for Respondent.

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COMMERCIAL BANK OF NEW BRUNSWICK. v. FLEMING.

THE COMMERCIAL BANK OF NEW BRUNSWICK v. FLEMING.

Check, initialing of by bank cashier—Acceptance—Set-off.

In an action on a bill of exchange, the defendant claimed to set off the amount of a check payable to "bearer," drawn by one L. upon the plaintiffs, several years previously, upon which their cashier had written the initials of his name. In 1867 L. gave the check so initialed to G., who kept it till a few days before the trial of the cause (1871) and then gave it to the defendant.

Held, 1st, That if the check could be treated as an inland bill of exchange, the initialing of it did not operate as an acceptance within the statute. 2nd, that even if the initialing of the check could operate as an agreement by the plaintiffs to pay the amount to L., it was only a chose in action which the defendant could not avail himself of in this suit.

This was an action brought on a bill of exchange. The defendant claimed to set off the amount of a check payable to "bearer," drawn by one Bartlett Lingley upon the plaintiffs several years previously, upon which their cashier had written the initials of his name. In 1867, Lingley gave the check so initialed to one Gardner, who kept it till a few days before the trial of this cause and then gave it to the defendant. The cause was tried before Weldon, J. at the Saint John Circuit in May, 1871, when a verdict was taken by consent for $4000 (the amount of the plaintiffs' claim), leave being reserved to the defendant to move to have the verdict reduced by the amount of the check.

In Trinity Term following, *A. L. Palmer, Q. C.*, obtained a rule *nisi*, against which, on October 18,

S. R. Thomson, Q. C. shewed cause.

Duff, Q. C. and *A. L. Palmer, Q. C.*, in support of the rule.

Besides the cases noticed in the judgment of the Court, the following cases and authorities were cited: *Mussey v. Eagle Bank;*[1] *Moore on Banking*, 280; *Bank of England v. Anderson;*[2] *Malcolm v. Scott;*[3] *Barwick v. English Joint Stock Bank.*[4]

Cur. Adv. Vult.

The judgment of the Court was delivered by

RITCHIE, C. J. There was no contract between the defendant and the plaintiffs in relation to this check, unless it grew out of

[1] 9 Metc. 306.
[2] 3 Bing. N. C. 589.
[3] 5 Exch. 601.
[4] L. R. 2 Exch. 259.

the very check itself, and then only by reason of the defendant being the holder,—assuming him to have been such at the time of action brought; and such contract could only exist by reason of the Bank having become a party to the check, which could only be in the character of acceptors. There was no privity whatever between the Bank and the defendant, and no consideration as between them, on which a contract could be based,—in fact, all the ingredients of a contract were wanting. The letters "G.S." were on the check before it came to the defendant's hands, and, until he claimed to set it off against the note on which this action was brought, he had no dealings or transactions with the Bank in reference thereto.

The case of *Keane v. Beard*,[1] shews that a check is a negotiable instrument and capable of indorsement; and it would seem to establish that there is such a strong analogy between a check and a bill of exchange that it is capable of being accepted. Thus, Erle, C. J. says, "It is *drawn* upon a banker; and, though in practice the banker does not *accept* the draft, he *might*, for aught I know, do so." (In this case, it would seem from the evidence, when the check was drawn and initialed, Lingley had no funds in the Bank to meet it.) Byles, J. in the same case draws a distinction between checks and drafts in these words; "In one thing it differs from a bill of exchange: it is an appropriation of so much money of the drawer in the hands of the banker upon whom it is drawn, for the purpose of discharging a debt or liability of the drawer to a third person; whereas it is not necessary that there should be money of the drawer in the hands of the drawee of a bill of exchange." And, after pointing out another difference, viz. that, in case of a check, the drawer is not discharged by delay in presentment, unless prejudiced thereby, he adds, "In all other respects a check is precisely like an inland bill of exchange."

The only case analogous to this, which I have met with in the English Reports, is *Robson v. Bennett*,[2] where it appears, by the practice of bankers in London, if one banker presents a check on another after 4 o'clock, it is not then paid, but merely an answer is given whether it is a good check or not, and a mark is put on

[1] 8 C. B. N. S. 372. [2] 2 Taunt 387.

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it, if good, either by the person presenting it, or the person who gives the answer, and checks so marked are paid next day, at noon, at the clearing house. Mansfield, C. J. says, "A draft was drawn on the 11th of September; on that day it was carried to the house of the drawee, and, in the language of those persons, was marked: the effect of that marking is similar to the accepting of a bill; for he admits hereby assets, and makes himself liable to pay. It is the practice of bankers not to pay bills of this description which are presented after 4 o'clock, but to mark them. And it is usual that bills marked on one day, are carried to the clearing-house, where their clerks meet, and paid there on the next day. Therefore it is the same thing as if a banker had written on a check,—'We pay this to-morrow at the clearing house.' * * * * The mark on the check is an engagement to pay at a particular place." But the difficulty of applying that case to the present is simply that there was no evidence in this case to establish any usage, custom or general practice among bankers and their customers, or the public, in the city of St. John, that a check marked by the initials of an officer of the bank amounted to an acceptance of the check, and that a check so marked, in the hands of the drawee, as this was, could, according to the ordinary course of business, be passed from hand to hand as this was, and the bank be liable on it at all hazards, in the hands of whomsoever it might be, as if it had been regularly accepted by them. The evidence, on the contrary, so far as there was any evidence on the point, was very much the opposite of this.

Again, could a mere mark, such as this, be treated, in this province, as an acceptance? If a check can be accepted at all, it can only be in its character of an inland bill of exchange; and, treating it as such, would not the 4th sec. of cap. 116 of the 1 Rev. Stat. apply, which enacts that "no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless it be in writing on such bill, or one part thereof, if there be more than one?" Should not the writing be such as itself evidences a consent to comply with the request of the drawer? and will anything short of this constitute an acceptance under the Statute? Without parol evidence to explain the letters "G.S.," what meaning could possibly be attributed to them? And was it not clearly the

intention of the Legislature to prevent acceptance of inland bill of exchange being proved by parol? At any rate, in the absence of any general usage or custom recognizing such letters as amounting to a general acceptance, or promise to pay the check when presented, how can we give it that effect?

The case of *Robson v. Bennett* was before 1 & 2 Geo. IV. cap. 78, which required acceptance of inland bills to be in writing.

It was argued that, though this might not amount to an acceptance, it amounted to an agreement to pay the amount; and that the Bank are estopped from saying they have not funds of the drawer to pay. Even if this were so, it could only be so as between the drawer and the Bank, and if it were so, there might be ground for an action by the drawer against the Bank for improperly refusing to pay his check. But how can it enure to the benefit of the defendant, who was no party to the contract? The defendant, if he can recover against the Bank, at all, must do so on the check; for, if the Bank are not liable on the check, there could be no liability on their part to the defendant, whatever there might be to Lingley, the drawer, because, if there was no acceptance, there was no contract, express or implied, between the defendant and the bank.

Rule discharged.

HATCH *v.* TAYLOR.

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Justice of the Peace—Second notice of action after discontinuance—First notice available—Requisites of notice—Tender of amends—Time.

A notice of action for false imprisonment was served on defendant, a Justice of the Peace, on the 19th March, and a writ issued on the 17th April. The plaintiff took out a rule to discontinue that suit, and got an appointment to tax the costs on the 9th July. On the 7th July, a second notice of action was served on the defendant, and a writ issued on Monday the 9th August.

Held 1st, That if the second notice was bad, the plaintiff could avail himself of the first notice notwithstanding the discontinuance of the suit commenced thereon. 2nd, That the second notice was sufficient though it did not allege that the defendant had acted maliciously,—he having acted, either entirely without jurisdiction, or in excess of his jurisdiction. 3rd, That, though the last day of the month's notice expired on Sunday, the defendant had not the whole of the following day to tender amends; and therefore the action was not commenced too soon.

This was an action of trespass against the defendant, a Justice of the Peace, for false imprisonment, tried before the Chief Justice at the York Sittings in November, 1871.

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A verbal complaint was made before the defendant against the plaintiff for stealing hay, by his (the plaintiff's) men. On this complaint, after some delay, during which the defendant advised a settlement, a summons was issued, the plaintiff was convicted, and a warrant of commitment was issued, upon which the arrest was made, for which the present action was brought.

At the trial the defendant produced his minutes of the case, wherein he states that a summons was issued for taking away hay, and that he proceeded under 1 Rev. Stat. c. 153, § 11. He also stated that he considered cutting and carrying away hay the same as cutting and carrying away growing corn. The learned Chief Justice charged the jury that the defendant had proceeded on a matter over which he had no criminal jurisdiction, and that it was not necessary in the notice of action to allege malice.

A verdict was entered for the plaintiff, and, on a former day of this term,—

Fraser moved for a new trial, on the ground of misdirection,

(1) In ruling, (a) that an allegation of malice in the notice was not necessary. (b) That the action was not commenced too soon; and (2) in telling the jury that the defendant acted without jurisdiction.

Cur. Adv. Vult.

The judgment of the Court was delivered by

RITCHIE, C. J. This was an action of trespass for false imprisonment tried at the last sittings for York, when a verdict, ununder the direction of the Chief Justice was found for the plaintiff. The plaintiff was arrested and imprisoned in gaol under a warrant issued by the defendant, a Justice of the Peace for the County of York.

The imprisonment complained of took place on the 9th February, 1869. A notice of action was served on the defendant on the 19th March, 1869. A writ was issued on the 17th of April, 1869. No declaration was filed or served. A rule to discontinue was taken out, and an appointment to tax costs on the 9th July, 1869. On the 7th of July a second notice of action was served

on the defendant, and the writ in the present action issued on Monday the 9th August, 1869.

The first notice was in all respects regular; but it is objected that, a writ having been issued on the 17th April, and the suit not having been proceeded with, and another notice served on the 7th July, the first notice ceased to be available for the plaintiff, and must be considered as having been abandoned. We cannot understand why this should be so. The object of the notice is simply to enable the party to tender amends, and the discontinuing of the first writ, or giving the second notice, in no way prevented him from doing this, had he so chosen, and if the amends tendered had, in the opinion of the jury, been sufficient, it would have been a complete bar to the action.

If this notice had been, for any reason, irregular or of no effect, there was the notice of the 7th of July. But it is urged that this was insufficient inasmuch as it did not allege the act to have been done maliciously. Such an allegation, however, was not in this case necessary, for the simple reason that it was abundantly clear that the magistrate acted either wholly without jurisdiction, or entirely in excess of his jurisdiction, in either of which cases there need be no allegation of malice. So that, in either case, the defendant had a good and sufficient notice. It was also objected that, if the last notice was relied on, the month ended on Sunday, and the defendant had all of the following day to tender amends, and that an action, commenced on the Monday, was too soon. Assuming that the first notice could not avail, there is nothing in this objection. The cases clearly shew that the general rule which prevails in the general practice of the courts, under which, when the last day of a given number of days for the doing of an act falls on a Sunday, the party has the whole of Monday to do it in, or the rule as to payment of money on a Judge's order, does not apply to the construction of statutes, which is founded on an entirely different consideration. See *Pennell v. Uxbridge* (Church-wardens &c.);[1] *Peacock, App. ats. The Queen, Respondent*;[2] *Morris v. Barrett.*[3]

There is, therefore, no reason whatever for our interfering with the verdict in this case, and the rule must be refused.

Rule refused.

[1] 8 Jur. N. S. 99; 31 L. J. M. C. 92. [2] 4 C. B. N. S. 267. [3] 7 C. B. N. S. 139.

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EUROPEAN AND NORTH AMERICAN RAILWAY CO. v. THOMAS.

EUROPEAN AND NORTH AMERICAN RAILWAY COMPANY FOR EXTENSION FROM ST. JOHN WESTWARD *v.* THOMAS.

Joint Stock Company.—Right to sue for Assessments.—Sale of shares before action.—Statutes.—Construction of.

Where a pecuniary obligation is created by statute, and a remedy expressly given for enforcing it, that remedy must be adopted.

The plaintiffs were incorporated by Provincial Act, 27 Vic., c. 43, for the purpose of constructing a railway from St. John to the boundary of the United States—the capital stock to be two millions of dollars, and the company to proceed to locate and complete the road as soon as $50,000 of the stock were paid in. The Directors were authorized to make equal assessments on the shares from time to time, as they might deem necessary, to be paid to the Treasurer, and in case any subscriber for stock neglected to pay the assessment the directors might order shares to be sold at auction, and in case of any deficiency, he should be accountable to the Company for the balance. By Act 32 Vic., c. 54, to amend the Act of incorporation, after reciting that it was doubtful whether the subscribers for shares were legally liable to pay assessments unless the whole amount of the capital stock had been subscribed for, and the $50,000 paid in and also, whether the notice of assessments had been given in accordance with the Act of incorporation, it was enacted. 1. That the subscribers for stock should be liable in the same manner and to the same extent as if the whole capital stock had been fully subscribed, and as if the $50,000 had been paid in, in the manner directed by the Act of incorporation, and as if all assessments on the shares and the notices given thereof, had been made and given according to the said Act. 2. That to entitle the Company to recover against any stockholder, two months notice of the assessment should be published in a newspaper, and after the expiration of that time, the Company should be entitled "to sue for, recover and receive from any stockholder the amount due for unpaid subscribed stock *in the same manner* as if the calls for assessment had been regularly made" in accordance with the requirements of the Act of incorporation. Held, 1st, That the Act 32 Vic. c. 54 was not *ultra vires* under the "British North America Act, 1867," § 92 sub-sec. 10; 2nd, (Per Ritchie, C. J., and Allen and Weldon, J J., Fisher J. *dubitante.*) That an action of debt could not be maintained under the Act of Incorporation, for the assessments on stock; but that the proceeding by sale of the shares must be adopted; 3rd, (Fisher J. *dissentiente*), That the preamble of the Act 32 Vic., c. 54, shewed that the object of the Legislature was not to alter the remedy given by the Act of Incorporation for the recovery of assessments, but to remove other difficulties; and that the words of section 2 did not give the Company a right to sue for assessments in the first instance.

The defendant, being a stockholder in the plaintiffs' Company, refused to pay certain calls made on his stock, and the present action was brought to enforce their recovery. At the trial before the Chief Justice at the Saint John circuit in January, 1871, a verdict was found for the plaintiff with leave reserved to enter a nonsuit.

Feb. 10, 1871. *Duff, Q. C.* moved for and obtained a rule *nisi* for a nonsuit on the following grounds.

1. The capital stock required was never all subscribed, and therefore no legal assessment could be made.

2. The assessment was made by the directors, who had no authority at common law or by statute to make it. It should have been by resolution of the stockholders.

3. No proper notice of the calls was given. It should have been a personal notice.

4. The Treasurer should have been sworn as required by the Act before he could give the notices.

5. No action will lie for the calls until the stock has been first offered for sale, and then only for the balance.

6. The erasure of the names of subscribers on the list prior to that of the defendant relieved him.

7. The plaintiffs cannot recover until they have offered the defendant his certificates of stock. There must be a *quid pro quo*.

8. The Act 32 Vic., c. 54 was *ultra vires* the Local Legislature, because the Western Extension Railway was part of a scheme for a continuous railway extending through the province into the State of Maine, in the United States.

9. Even if the Act of 1869 is valid, it does not cure the defect in the assessment from its having been made by improper persons.

10. It does not cure the defect of the want of personal notice.

11. Nor does it cure the defect of the shares not being sold,—the remedy must be by sale as before.

12. It would only render the subscribers liable *pro rata* on the whole subscribed stock.

13. Even under the Act of 1869, the notice did not comply with that Act. It does not say the assessment was made on the whole stock and does not specify any time or place for payment.

April 18, 1871. *A. L. Palmer, Q. C.* and *Dr. Barker* shewed cause.

April 19. *Duff, Q. C.*, and *S. R. Thomas, Q. C.* in support of the rule.

In addition to the cases noticed in the judgments, the following cases were cited: *Ornamental Pyrographic Woodwork Co. v. Brown*,[1] *Crookshank v. McFarlane*,[2] *Waterloo Bridge Co. v. Cull*,[3] *Waterford Railway Co. v. Logan*,[4] *Fox v. Clifton*,[5] *Ex parte*

[1] 2 H. & C. 63.
[2] 2 All. 554.
[3] 1 E. & E. 213.
[4] 14 Q. B. 672.
[5] 6 Bing. 776.

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Ward.[1] *Oldtown Railway Co. v. Vesey.*[2] *Atlantic Cotton Mills v. Abbott.*[3] *Society of Practical Knowledge v. Abbott.*[4] *Stratford and Moreton Railway Co. v. Stratton.*[5]

Cur. Adv. Vult.

The judges now delivered the following judgments:—

RITCHIE, C. J. This was an action against the defendant as a shareholder in the E. & N. A. Railway Company for certain calls. The plaintiffs were incorporated by the 27th Vic., c. 43, whereby certain persons including the defendant were made and constituted a Body politic and corporate by the name of "The European and North American Railway Company for extension from St. John Westward;" the object of the incorporation being to enable them to construct a railroad "from the city of St. John, in the County of St. John, in this Province, westward, to the boundary of the United States." The 30 Vic., cap. 6 and 30 Vic., cap 12 were subsequently passed in aid of this undertaking, but no question arises in this case under the provisions of either. In 1869 the 32 Vic., cap. 54, an Act to amend the 27th Vic., cap. 43, was passed, which has a most important bearing on many of the questions raised, and, therefore, of the many points submitted for our consideration, it will be most convenient first to dispose of the one which presents the question as to the validity of the Act 32 Vic., c. 54, as on this a number of the other questions are dependent.

It was contended that this Act was *ultra vires* the Local Legislature, and therefore void—that under the British North America Act, 1867, section 92, sub-section 10, paragraph (a), it was withdrawn from the class of subjects on which the Provincial Legislatures might legislate, and that by force of section 91, which declares the matters over which the Parliament of Canada should have exclusive legislative authority, it belonged exclusively to that Parliament. Under section 92, which enumerates the matters confided exclusively to the local legislature, we have by sub-section 10 "Local Works and undertakings *other than such of the following classes,*" then follow three paragraphs *a, b,* and *c,* of excepted classes. Paragraph (*a*) is the only one that bears on the

[1] L. R. 3 Exch. 180.
[2] 39 Maine R. 571.
[3] 9 Cush. 423.
[4] 2 Beav. 559.
[5] 2 B. & Ad. 519.

subject before us. It reads thus: "Lines of Steam or other Ships. Railways, Canals, Telegraphs and other works and undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province." Under section 91, which specifies the classes of subjects assigned exclusively to the Parliament of Canada, by sub-section 29 we have, "such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this act assigned exclusively to the Legislatures of the Provinces." It is contended that the subject matter of this Act comes within one of such exceptions, and is, therefore, beyond the power of the Provincial Assembly.

The 27th Vic., cap. 43, of which the Act under consideration is an amendment, is an Act to incorporate "the E. & N. A. Railway Company for extension from St. John, westward," and authorizes the Company so incorporated to locate and construct and finally complete a Railroad "from the City of St. John in this Province, westward, to the boundary of the United States." Such a railway, if constructed, clearly does not connect this Province with any other or others of the provinces, and, without stopping to notice the marked difference of the language "connecting the Province with any other or others of the provinces," and *"extending beyond the limits of the Province,"* can we say a railway extends beyond the limits of the Province when its location, construction and completion is actually confined within the Province, and when it is limited in its extent "to the boundary of the United States," but not authorized to go one inch beyond? But it was claimed to have been shewn by evidence outside the Act that, at the time it was passed and also at the time of the passing of the 32 Vic., cap. 54, it was contemplated and intended by the promoters of the undertaking to connect with a line of railway to "be built in the State of Maine, in the United States, to meet the E. & N. A. Railway for extension from St. John, Westward," at the boundary of the United States, and, therefore, it is contended, it was a railway extending beyond the limits of the Province. But we think we have no right to look to intentions, or anticipations, or doings of parties outside the Provincial Legislature, either in the State of Maine or in the Province of New Brunswick, and that the intention of the Legislature, as expressed in the Act, alone

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can control us—that the fact of the Legislature of the State of Maine authorizing, or its people intending to construct, or actually constructing a line of railway in that country, cannot in any way affect the authority of our own Legislature to legislate on, and deal with, railway undertakings, provided always such railways do not connect the Province with any other or others of the provinces, nor extend beyond the limits of the Province. This is the simple question, and all we have to consider in determining on the validity of the Act. As to any possible or probable connection of the railway authorized to be constructed under this Act (which may have been thought of at the time of passing the Act), with a line or lines of railway to be constructed, not under the authority of these Acts, in the United States, we have nothing to do. We therefore think this is a local work and undertaking other than such as are of the classes enumerated in paragraphs, *a*, *b* and *c* to sub-sec. 10 of sec. 92, and, in relation to which, the Legislature of this Province may exclusively make laws. The 32 Vic., cap. 54 being, therefore, in our opinion, valid, that Act disposes of the 1st, 2nd, 3rd, 4th, 9th, and 10th objections, for, however valid all or any of these objections might have been before the passing of the 32 Vic., cap. 54, or whatever doubts might have existed, that was expressly passed to obviate such objections. There were such doubts, for the doubts which the 32 Vic., cap. 54 was passed to remove, as indicated by the recital, were whether the subscribers for shares were or could be made legally liable for the sums by them subscribed, (1) by reason of the whole capital stock not having been subscribed; (2) because the Company may have proceeded to locate, construct, etc., the railroad without the sum of fifty thousand dollars of capital stock having been paid in in the manner prescribed by the Act of incorporation; (3) because it may be doubtful whether any assessment made and notices of the same required by the Act are regular unless $2,000,000 stock had first been subscribed and $50,000 paid in; (4) because it may be doubtful if notices of calls have been given in accordance with the terms of the Act. And the first section of the Act proceeds to enact that the subscribers *shall be held liable in the same manner and to the same extent,* as if the whole capital had been subscribed and as if the $50,000 had been paid in in the manner prescribed,

and as if all assessments made and notices given were made and given according to the terms of the Act; that the notices of assessment which have been given shall be held regularly and lawfully given; and that the subscribers shall be liable to assessments made or to be made *in the same manner and to the same extent* as if the $2,000,000 had been subscribed and $50,000 paid in and notices of calls given as required by the Act. The second section enacts that all steps taken or acts done or to be done by the company under the Act shall in every respect be as legal and correct as if the $2,000,000 had been subscribed and the $50,000 paid in at the time and in the manner prescribed.

During the argument, we intimated an opinion that there was nothing in the 6th and 7th points, and we adhere to that opinion. The 5th and 11th points are not so easily disposed of. The 5th is that the 27th Vic., Cap. 43, points out a particular mode for enforcing payment of calls, and that no action will lie until the stock is first offered for sale, and then only for the balance, after crediting the net proceeds of the sale; and the 11th is that this is a defective proceeding of resorting to action in the first instance, and passing by the mode pointed out by the Act, is not cured by the 32 Vic., Cap. 54.

As to the first of these questions,—the 5th Sec. of the 27th Vic., cap. 43, authorizes the President, Directors and Company for the Company to exercise the powers therein granted and (*inter alia* "to make such equal assessments from time to time on all the shares in said corporation as they may deem necessary and expedient in the execution and progress of the work, and direct the same to be paid to the treasurer of the Corporation, and the treasurer shall give notice of all such assessments: and in case any subscriber or stockholder shall neglect to pay any assessment on his share or shares for the space of thirty days after such notice is given as shall be prescribed by the Bye-Laws of said Corporation, the Directors may order the Treasurer to sell such share or shares at Public Auction, after giving such notice as may be prescribed as aforesaid, to the highest bidder, and the same shall be transferred to the purchaser; and such delinquent subscriber or stockholder shall be held accountable to the Corporation for the balance, if his share or shares shall sell for less than the assessment due thereon, with

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interest and costs of such sale, and shall be entitled to the overplus, if his share or shares shall sell for more than the amount due, with interest and cost of sale; provided that no shareholder in said Company shall be in any measure whatever liable for any debt or demand due by the said Company, beyond the amount of his or their shares in the capital stock of said Company, not paid up; and no assessment shall be laid upon any shares in said Company for a greater amount than $50 per share in the whole."

The only other reference in the Act to calls is in sec. 9, which, after declaring that the shares shall be deemed personal estate, and transferable as such, and shall entitle the holder to a proportionate part of the profits, enacts; "but no shareholder shall be entitled to transfer any share after any call shall have been made in respect thereof, until he or she shall have paid all calls for the time being due on every share held by him or her."

No English authorities were cited bearing directly on this point, but numerous American authorities were relied on as establishing the pr position that such a remedy as that given by the Act in this case was only cumulative. The American authorities, so far as I have had an opportunity of examining them, appear by no means satisfactory, being very far from uniform, as we have noticed in different States and Courts of the Union very conflicting decisions on this subject. And in *Abbot's Digest of the Law of Corporations,* we find it stated that, upon the question whether, independent of a charter provision, a Corporation may sue a subscriber upon his engagement to take shares, the authorities are not agreed.

The proposition, so broadly laid down in *Angell and Ames on Corporations* (§549) in these words: "It is well settled that a power conferred by the Legislature on a Corporation, to sell stock for default of payment of an instalment by a subscriber, does not exclude the Common Law remedy to recover it, and he is still liable in an action of assumpsit. The penalty of forfeiture is cumulative, so that the Company may waive it and proceed, *in personam* on the promise," and, in §580, "where it is said that remedies by action or forfeiture are *cumulative,* nothing more is to be understood, than that the Company has a right to sue, or the right to forfeit, at their election, or that they may proceed to

judgment upon the subscription, and then forfeit the stock for the same delinquency. But the converse of the proposition that they may exercise the right of forfeiture, and then maintain or enforce a judgment, is not maintainable. A forfeiture is more than a means of satisfaction, and is of itself a satisfaction,"—which was so find by no means borne out by the authorities cited in its support, and on which alone it would appear to be based; for, in the much pressed on us by the learned counsel for the plaintiffs, we English cases cited express power was given by the Act to sue, and, therefore, they do not touch this case. We must rely, therefore, on principle, and the English authorities, so far as they bear on or tend to elucidate the point at issue, having always in mind the words of the Act; for, after all, by the provisions and peculiar phraseology of the Act itself, must the decision of the question mainly depend,—as from this alone is the intention of the Legislature to be gathered We have no general law, governing Corporations such as this, bearing on this subject, analogous to the Company's Consolidation Act in England. We have, indeed, a general Act, 1 Rev. Stat. Cap. 119 "of Corporations;" but it contains no provisions on this subject, and, though the general Act 25 Vic. cap. 28, relating to Corporations formed under the special provisions of that Act, provides that stockholders are to be liable to process, and express authority is given to sue, it does not apply to this Corporation. Each Act of incorporation, such as we are considering, contains within itself the provisions by which payment of calls are to be enforced, and a reference to those which were passed in 1864, when the Company was incorporated, and in 1869, when the Act of Incorporation was amended, will shew that, while the legislation has been very diverse in this particular, where it was clearly intended to establish a primary personal liability, express provision to that effect was made. In the Session of 1864, of some nine Acts of Incorporation passed, one contains no provision at all relative to calls; one merely provides "that no share shall be transferable until all calls previously made thereon shall have been paid, or until such share shall have been declared forfeited for non-payment of calls;" one directly establishes a personal liability and gives express authority to sue; one does the same and gives additional authority to forfeit stock; and five are

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substantially similar to the Act under consideration. In 1869, when the Act in amendment was passed, of some our Acts passed, one declared, on refusal to pay assessment, that it should be the duty of the Treasurer to advertise delinquent shares for sale, etc., with this proviso, "that nothing in this section shall prevent proceeding at law for the recovery of any and all sums due from any shareholder;" two provided that "such call or assessment when made shall be deemed to be and shall be a debt due from the shareholder to the Company, and may be sued for and recovered by the Company," and it likewise declares it to be the duty of the Treasurer to advertise shares for sale, as in the last, and one declares that it shall be lawful for the Company to sue the shareholder, and likewise provides, in case of non-payment, for sale of delinquent shares. No doubt a reference to the legislation of other years would shew similar characteristics, from which a fair inference may be drawn that the Legislature was quite alive to the use of unequivocal language where a primary personal liability was intended to be established. And as a further illustration, and as strongly exemplifying the legislative view on this question, as being in harmony with the conclusion at which we have arrived, we may refer to the Act of Incorporation of the South Bay Boom Company, 10 Vic. cap 72[1] and 11 Vic. cap. 49[2] in amendment thereof, to which our attention has been accidentally directed while considering another case now before the Court.

If the Legislature, which must be presumed to know the state of the law, had supposed the remedy by sale merely cumulative, the passing of the 1st section of the 11 Vic. would have been wholly unnecessary.

A reference to some authorities bearing more or less directly on the question may not be out of place here. In *Doe d. Bishop of Rochester v. Bridges,*[3] Lord Tenterden, at p. 859, thus states the principle: "and where an Act creates an obligation, and enforces

[1] Section 11 enacts, that "if any stockholder shall neglect or refuse to pay to the Treasurer the amount of such assessment upon his share or shares at the time prescribed, it shall be the duty of such Treasurer to advertise all such delinquent shares for sale at Public Auction."

[2] Section 1 enacts, that if any shareholder "shall have failed or shall fail to pay the amount of such call, or any part thereof, it shall be lawful for the said Company to sue such shareholders for the amount thereof * * * and to recover the same with lawful interest from the day on which such call was payable, with costs of suit."

[3] 1 B. & Ad. 847.

the performance in a specified manner, we take it to be a general rule that performance can not be enforced in any other manner."

In the case of the *Dundalk Western Railway Co. v. Tapster*,[1] the Court carried the doctrine to a very great length, so much so that on the case being cited in *Vestry of St. Pancras v. Batterbury*.[2] WILLES, J. says, "I think that case has been somewhat doubted." But this is the only observation I have met with of that character. It was an action for calls which, if not paid as provided, the statute declared it should "be lawful for the Company to sue for the same in any of the Queen's Courts of Record in Dublin," and the defendant pleaded that he was liable to be sued there and not otherwise or elsewhere. Demurrer. In the course of the argument, Patteson, J. observed, "It is only by the aid of the statute that one partner can sue another. Must you not take the remedy the statute provides?" Counsel answers, "The partnership is incorporated." Patteson, J. "Could such a corporation sue its own member without the express provisions of the Act?" It was then argued that, though the Act gave power to sue in Ireland, it did not prohibit suits elsewhere, and also, very much as was pressed upon us in this case, that the call makes the defendant a debtor to the Company with all the consequences and liabilities incident to a debt; but Lord Denman says, "The right and the remedy are both created by the Legislature, and the Company are bound to pursue the remedy provided by it," and in this the other Judges concurred.

In *Stevens v. Jeacocke*,[3] it was held to be a rule of law "that an action will not lie for the infringement of a right created by statute, where another specific remedy for infringement is provided by the same statute." And Erle, J., in delivering the judgment of the Court, says, "this general doctrine was adopted in *Underhill v. Ellicombe*,[4] where debts for highway rates was held not to lie, inasmuch as the claim was given by statute, and the same statute which created it prescribed a particular remedy for its enforcement," and cites and adopts the language used in *Doe d. Bish. of Rochester v. Bridges* before quoted. In the case of the *Cork and Bandon Railway Co. v. Goode*,[5] we see it very clearly established that

[1] 2 C. B. N. S. 485.
[2] 1 Q. B. 667.
[3] 11 Q. B. 741.
[4] McLel. & Y. 450.
[5] 13 C. B. 826.

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the liability for calls under the Company clauses consolidation Act 8 & 9, Vic., cap. 16 (and *a fortiori* under this Act, as a comparison of the two will readily establish), is a statutory liability, and therefore the claim is not barred in six years, the proper limitation being by 3 & 4 Wm. 4, c. 42, §3, twenty years. In the course of the argument in this case, Creswell, J. asks, "what is the contract between the shareholders and the Company? Where is it made? and how? By writing, by word of mouth or by instrument under seal?" Maule, J. "where is the shareholder's undertaking to pay calls but for the statute?" Counsel, "I must concede that there is none." Maule, J. "Then he undertakes by the statute. Is an action brought upon that undertaking, an action brought a contract without a specialty?" Again, at page 833, Maule, J. says, "If an Act of Parliament says that certain persons shall pay certain monies, and nothing more, debt is undoubtedly the appropriate remedy. The statute creates the debt; but it would be necessarv to allege specially all the circumstances essential to bring the party under the liability."

Jervis, C. J. "I think it *is* an action upon statute, * * * But for the Act of Parliament, no action could be brought by the Company against one of its own members. This, therefore, is an action brought in respect of a liability created by statute, and therefore is an action founded upon the statute, and the plea which relies on the six years' limitation is no answer to it." Cresswell, J. "This is plainly an action upon a statutory liability to pay the calls; and the defendant is not at liberty to tell us that it is an action upon contract without specialty." Talfourd, J. says, "The relation between the shareholders and the Company is the creature of the Act of Parliament." In *Wolverhampton Water Works v. Hawkesford,*[1] which was an action for calls under a local Act, 18 and 19 Vic. cap. 151, for supplying the town of Wolverhampton with water, incorporating the "Companies Clauses Consolidation Act," 8 and 9 Vic. c. 16. Cockburn, C. J. says, "The liability on which this kind of action rests is entirely the creature of the statute." And Willes, J., says, "The second count shew no liability either at common law or under the Companies

[1] 28 L. J. C. P. 242; 6 C. B. N. S. 336; 5 Jur. N. S. 1104.

Consolidation Act. At common law it must have been shewn that the subscriber was a contractor *with the Company that sues.* That is not stated, and could not be stated here. Then it is said there is a liability imposed by statute 8 & 9 Vic., cap. 16, sec. 21; and, in determining that, one must assume there to be no liability at common law. * * * There are three clauses of cases where a liability may be established as founded upon a statute. The first class is one in which the liability exists no doubt at common law, and the statute re-enacts that liability, and gives a special and particular remedy more beneficial than, or at least different from, that given by the common law. There, unless, the statute contains words which expressly or by necessary inference as applied to the particular case, excludes the common law remedy, the plaintiff has his election to proceed under the statute or at common law. The second class consists of those cases in which the statute creates the liability to pay money, or do some other act, but gives no special remedy; in that event, an action of debt, or other appropriate remedy is open whether there was a common law remedy or not. The third class is where a statute enacts that there shall be a remedy which did not exist at all at common law, or not in the form in which the statute gives the special remedy for enforcing that liability. Within that class of cases this, as it appears to me, falls, and, in such cases, it has always been held that the party suing on such liability so created must follow the particular remedy pointed out by the statute, and is not at liberty to follow the mode belonging to the second class. The Company, therefore, are bound, I think, to adopt the remedy which gives the right." The case of the *Vestry of St. Pancras v. Batterbury*[1] likewise establishes that, where a pecuniary obligation is created by a statute, and a remedy expressly given for enforcing it, that remedy must be adopted; and Williams, J. refers to the case of *Shepherd v. Hills,*[2] which, he says, at first sight seems to be at variance. but he explains it away by the observation that, in that case, the remedy did not cover the whole right. In *Couch v. Steel,*[3] Lord Campbell, C. J. says; "In *Underhill v. Ellicombe,*[4] it was held that, where highway rates were payable by the provision of a statute which

[1] 2 C. B. N. S. 477.
[2] 11 Exch. 55.
[3] 3 E. & B. 413.
[4] McLel. & Y. 450.

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prescribed a particular mode for their recovery, that mode only could be pursued. And in *Doe d. Rochester (Bishop) v. Bridges,*[1] it was held that, a statute having prescribed a particular mode for the recovery of an equivalent for land tax redeemed, no other mode could be adopted for enforcing the payment of the equivalent. In the present case (he says) if the statute had prescribed a particular mode by which a person sustaining actual damage by reason of a breach of the duty imposed by the statute was to recover compensation, undoubtedly that mode only could be adopted."

We think there can be no doubt, then, that, though on the one hand, where a right with its appropriate remedy exists at common law, if a statute gives a new remedy in affirmative words, without a negative express or implied, this does not take away the common law remedy: on the other hand, it may be safely affirmed that, where a pecuniary obligation is created by statute and a remedy expressly given for enforcing it, that remedy must be adopted. At the same time, it is equally true, if an obligation is created, but no mode of enforcing its performance is ordained, the common law may in general find a mode suited to the particular nature of the case.

Here, the statute which creates the debt or duty, in the same section which comprises the authority to make the assessment, and immediately following the words of that authority, gives the remedy or means for realizing the assessment when made, thus "to make such equal assessments from time to time on all the shares in said corporation as they may deem, etc., and direct the same to be paid to the treasurer of the corporation, and the treasurer shall give notice of all such assessments; *and in case any subscriber or stockholder shall neglect to pay any* assessment on his share or shares for the space of thirty days after such notice is given as shall be prescribed by the bye-laws of said corporation." What then? Is any general power to sue given? Or any alternative remedy provided? No, but provision is nevertheless then and there made for recovering the assessment, if the contingency previously suggested, of non-payment, should arise, in these words, immediately following those last quoted, "the Directors may

[1] B. & Ad. 847.

order the treasurer to sell such share or shares at public auction, after giving such notice as may be prescribed as aforesaid to the highest bidder, and the same shall be transferred to the purchaser, and *such delinquent subscriber or stockholder shall be held accountable to the corporation for the balance,* if his share or shares shall sell for less than the assessment due thereon with interest and cost of sale, and shall be entitled to the surplus if his share or shares shall sell for more than the assessment due, with interest and costs of sale."

Here, then, we have a summary remedy given, which the Company may enforce against the stock without suit, and a personal accountability for any balance due, and not realized by sale of the stock, enforceable against the shareholder by suit. Does not this provision fairly exclude the supposition that the Legislature intended that there should be a primary personal liability, enforceable against the person and estate of the shareholder, at law, without resorting to the means expressly provided, and that the remedy so provided was merely cumulative? Is this not just a case where, as said by Creswell, J. in *Vestry of St. Pancras v. Batterbury,*[1] "the pecuniary obligation and the mode of enforcing it are indissolubly united by the statute, and cannot be served."

The right to make the assessment is given,—notice of this is provided for,—in the event of non-payment after a certain period, a means is provided for enforcing payment. If this fails, a personal accountability is fixed. What is there that will enable us to say that, in addition to, and as entirely distinct from this, there is from the shareholder to the corporation a primary, direct, absolute, personal obligation, which the corporation, ignoring the mode of remedy prescribed, may enforce by suit? Why should we so hold? The remedy given by the statute is a summary proceeding clearly for the benefit of the Company; for, should the stock sell for sufficient to pay the call, it is realized without the expense and inconvenience of litigation, and that, too, where there is nothing, if the assessment has been properly made, to call for a legal decision, through the intervention of a court and jury. If the proceeds of the sale are insufficient, the Company have their remedy against the shareholder, who is, in that

[1] 2 C. B. N. S. 487.

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event, made personally responsible and accountable for the deficiency, so that there would seem to be a substantial reason why they should be confined to the remedy given by the statute; and no good reason that I can discover, why they should be permitted to depart from it. And I cannot very well see how we can escape the conclusion that no right of action, in the first instance, is given by the Act, nor, independently of it, does any exist; but that the present belongs to that class of cases where the statute at once imposes the duty and directs the remedy.

This brings us to the eleventh objection, that the defect of the shares not being sold is not cured by the 32 Vic., cap. 54. The preamble of this Act, as we have seen, very distinctly expresses the four difficulties, or doubts, intended to be covered. But it is alleged that the enacting clauses go beyond the preamble, and cover this case by recognizing, and thereby establishing, the plaintiffs' right to resort, in the first instance, to an action, notwithstanding the original act of incorporation might not have justified such a proceeding. While it is, as stated in *Bac. Abr. Statute* (1) 2, in general, true that "the preamble of a statute is a key to open the mind of the makers as to the mischiefs which are intended to be remedied by the statute," if the words in the enacting clause go clearly beyond the preamble, some effect is to be given them; but, if not, then the clause is to be construed with reference to the preamble. See *Skinner v. Lambert.*[1]

Section 3[2] is relied on by the plaintiffs. Had it stopped with the words, "the said Company shall be entitled to sue for, recover and receive from any subscriber the amount due for unpaid subscribed stock which may have been subscribed for by such subscribers," there might have been much force in the plaintiffs' contention; but these words are added, "in the same manner as if the calls

[1] 4 M. & G. 488.

[2] Section 3 enacts, "That to entitle the said Company to recover against any subscriber or stockholder, a notice shall be given by the President of such Company, such notice to be published in one or more of the public newspapers published in the city of Saint John for the period of two calendar months, which notice shall specify the amount of assessment, that is, whether the whole or what part of the subscribed capital stock, and shall require the same to be paid to the Treasurer; and from and after the expiration of the said two months publication, the said Company shall be entitled to sue for, recover, and receive from any subscriber the amount due for unpaid subscribed stock which may have been subscribed for by such subscribers in the same manner as if the calls for assessment had been regularly made and published or served in accordance with the strict requirements of the Act incorporating the said Company."

for assessment had been regularly made and published or served in accordance with the strict requirements of the Act incorporating the said Company." Does not this, taken in connection with the plain expression of the preamble as to the object of the Act, shew that no greater liability was to be cast on shareholders than was imposed by the Act of Incorporation, and that, on the notice prescribed to be given by this section 3, the right of the Company to sue for, recover and receive from the shareholders was only to be *in the same manner* as if those things had regularly been done in accordance with the strict requirements of the Act incorporating the Company, not to create a new liability, or establish a new mode of procedure, but to remove any difficulties that might be in the way of pursuing the mode originally pointed out, by reason of a non-compliance with the preliminary requirements, or other irregularities in carrying them out? Thus, we see in section 1, the first words are, "that the subscribers to said capital stock shall be held liable in *the same manner* and to the same extent as if the whole of the capital stock, as in said recited Act is mentioned, had been fully subscribed, and as if the said $50,000 had been paid in, and as if all assessments had been made and notices given according to the terms of the said recited Act." And the section declares shareholders liable to the assessments *in the same manner* and to *the same extent* as if the whole amount of $2,000,000 had been subscribed for and taken up, and the $50,000 had been paid in the manner and at the time required by the said Act, and as if the notice and notices of calls and assessments had been made and given as required by said recited Act.

Surely some effect must be given to the words "in the same manner as if etc." in the 3rd section; and to do so we can properly read them as if the words expressing the "manner" referred to in the Act of Incorporation were actually repeated, for "verba relata hoc maxime operantur per referentiam ut in eis inesse videntur," —see per Blackburn, J. in *Melsom v. Giles*,[1] who also observes, "All are agreed that words of reference bring down the matters they refer to, as if repeated."

Again, I think the words should be very clear and explicit to justify the Court in burthening parties with liabilities by *ex post*

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facto legislation. In the case of the *Conservators of the River Thames v. Hall*,[1] which enunciates and confirms the doctrine, that a general enactment in a late statute does not repeal a particular enactment in an earlier statute, unless the intention to do so is manifest, or the implication irresistible, Montague Smith, J. mentions with approval, and as binding, the rule, as laid down by Sir Orlando Bridgman that "the law will not allow exposition to revoke or alter by construction of general words, any particular statute, where the words may have their proper operation without it." Taking, then, the object of this Act as clearly indicated by the preamble, the continued reference in the enacting clause to the way for the recovering "in the same manner" as that provided by the Act of Incorporation, and the retrospective character of the Act, I think we can scarcely arrive at the conclusion that the Legislature intended to give the plaintiffs any other right of action, or any other power to recover unpaid calls, than they could have had under the Act of Incorporation, if all the requirements of that Act had been regularly complied with; but that the obvious intention was to secure to them precisely the same remedies, by protecting them from the irregularities or non-compliances referred to, which might bar the right to effectually resort to the means of recovery provided: and the words of Lord Tenterden, in *Halton v. Cove*,[2] seem very pertinent. He says, "It is very true, as was argued for the plaintiff, that the enacting words of an act of parliament are not always to be limited by the words of the preamble, but must, in many instances, go beyond it. Yet, on a sound construction of every act of parliament, I take it, the words in the enacting part must be confined to that which is the plain object and general intention of the Legislature in passing the Act, and that the preamble affords a good clue to discover what that object was." Now, looking at the preamble and enactment here, I think we can see very clearly what the Legislature intended; namely, to enable the Corporation to avail themselves of the remedies provided by the act of incorporation. And I think it is equally apparent that the Legislature did not intend to impose new obligations, or give new rights, or new remedies, but only to make the old available.

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[1] L. R. 3 C. P. 415.

[2] 1 B. & Ad. 558.

ALLEN, J. The principal questions arising in this case are, 1st, Whether a stockholder is liable to be sued for calls under the Act incorporating the Company (27 Vic. c. 43); and 2nd, Whether, if not so liable under that Act, a right of action is given to the Company by the Act 32, Vic. c. 54.

The 5th section of the Act of incorporation, under which the first question arises, authorizes the Directors (*inter alia*) "to make such equal assessments from time to time on all the shares in said Corporation as they may deem necessary and expedient in the execution and progress of the work, and direct the same to be paid to the Treasurer of the Corporation, and the Treasurer shall give notice of all such assessments, and in case any subscriber or stockholder shall neglect to pay any assessment on his share or shares for the space of thirty days after such notice is given, as shall be prescribed by the bye-laws of said Corporation, the Directors may order the Treasurer to sell such share or shares at Public Auction, after giving such notice as may be prescribed as aforesaid, to the highest bidded, and the same shall be transferred to the purchaser, and such delinquent subscriber or stockholder shall be held accountable to the Corporation for the balance, if his share or shares shall sell for less than the assessment due thereon, with interest and costs of sale; and shall be entitled to the overplus if his share or shares shall sell for more than the assessment due, with interest and cost of sale."

Now, the question is, whether the Company have any right of action against a shareholder for calls under the section, or whether they are bound to proceed by a sale of the shares in case of default of payment—in other words whether the proceeding of sale is a cumulative remedy?

In *Angell & Ames on Corp.* § 549, it is said that "it is well settled that a power conferred by the Legislature on a Corporation to sell the stock for default of payment of an instalment by a subscriber, does not exclude the common law remedy to recover it, and he is still liable in an action of assumpsit. The penalty of forfeiture is cumulative, so that the Company may waive it, and proceed *in personam* on the promise." In support of this the cases of *The Birmingham & Bristol Railway Co. v. Lock;*[1] *The London Grand Junction Railway Co. v. Graham,*[2]

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and a number of American authorities are cited. I have no means of ascertaining how far the American cases sustain the position; but the cases in the 1 *Q. Bench* certainly do not do so;—no such question was, or could be raised in those cases, because express power was given by the Acts, under which the Companies were formed, to sue for calls.

It appears by the statement of the American cases on this subject in *Abbott's Digest of the Law of Corporations,* that they hold differently in the various States. Thus, it is said on page 38, *pla.* 136, "Upon the question whether, independent of a charter provision, a Corporation may sue a subscriber upon his engagement to take shares, the authorities are not agreed. The doctrine in New York and some other States appears to be, to hold the provision in the charter to sell the shares as a remedy merely cumulative, and to sustain an action for assessment without an express promise to pay, and before resort is had to a sale of the shares. In Massachusetts the doctrine is otherwise, and it has there been held that, where there is no express promise to pay the assessments, the remedy in the first instance is by a sale of the shares. And this has been declared to be the rule in New Hampshire.

Upon an examination of the authorities, and upon principle, the true rule appears to be this:—that where a party makes an *express* promise to pay the assessments, he is answerable to the Corporation upon such promise for all legal assessments, and may be compelled to its performance by action at law, before resorting to a sale of the shares. It is a personal undertaking beyond the terms of the charter. Where, on the other hand, he only agrees to take a specified number of shares, without promising expressly to pay assessments, there resort must first be had to a sale of the shares to pay the assessments before an action at law can be maintained. His agreement simply to take the shares is an agreement upon the faith of the charter, and by it alone is he to be governed so far as his shares are to be affected. He takes them upon the conditions and laws of the charter. They exist only by virtue of the charter, and are to be governed by the provisions therein contained."

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[1] 1 Q. B. 256.

[2] 1 Q. B. 271.

In *pla.* 137, it is said "if no statute or bye-law provides another remedy for the recovery of assessments, corporators are liable therefor in an action of assumpsit, though they have made no express promise:" citing *Essex Bridge Co. v. Tuttle,*[1] and two cases from Illinois. And this agrees with what is said by Maule, J., in *The Cork & Bandon Railway Co. v. Goode.*[2]

In *pla.* 138, it is said, "a Corporation cannot, in an action at law, recover the amount of the shares, or the assessments on them, unless the holder has expressly agreed to pay them, or unless by the charter or some other statute, a personal obligation to pay is imposed on the holder." For this the case of *The Kennebeck & Portland Railway Co. v. Kendall*[3] is cited. There, the charter provided no mode of enforcing payment of assessments, but gave the Corporation power to establish such bye-laws as should be deemed necessary and proper for the management and regulation of their affairs, not repugnant to the laws of the state; also, to make and collect such assessments on the shares of the capital stock, as might be deemed expedient, in such manner as should be prescribed in their bye-laws. The Corporation made a bye-law authorizing the Directors to make assessments upon the shares, and the Treasurer, in case of delinquency by any stockholder, in the payment thereof, to sell his shares. They also made a bye-law, that if the shares of any such delinquent stockholder should not sell for a sum sufficient to pay his assessments, he should be held liable to the Corporation for any deficiency.

The defendant (with others) had signed a paper stating that they agreed to subscribe to the stock in the Company, the number of shares set against their names. Twelve shares were written against the defendant's name. Several assessments had been made upon these shares, which the defendant had neglected to pay, and the shares had been sold by the Company for a less sum than was due. The action was brought to recover the balance, and it was held that the bye-law did not impose any personal liability. Shepley, C. J., in delivering the judgment says, "a Corporation may, in an action at law, recover the amount due for its shares, or for assessments legally made upon them, when

[1] 2 Verm. 333.
[2] 13 C. B. 834.
[3] 31 Maine 470.

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by its charter or other statute provision, a personal obligation is imposed upon the holder to pay for them, or, when the holder has made an express agreement to pay for them. Without proof of such an agreement, or personal obligation, the Corporation cannot recover. These positions are established by many decided cases. * * * When the language of a charter or statute does not in terms authorize the Corporation to make a call personally upon a holder of stock, or impose upon him a personal obligation to pay, but authorizes a collection by sale of the shares, the construction in this, and most of the other States has been, that no personal obligation to pay was imposed."

The doctrine enunciated in this case is entirely in accord with the principle of the few English decisions to be found on the subject. Thus, in *The Dundalk Railway Co. v. Tapster,*[1] where an Act for making a Railway in Ireland, provided that if any proprietor of shares refused to pay a call, it should be lawful for the Company to sue for it in any Court of record in *Dublin,* it was held that the Company could not sue in an English Court; and Lord Denman said, "The right and the remedy are both created by the Legislature, and the Company are bound to pursue the remedy provided by it," and Patteson, J. said, "It is only by aid of the statute, that one partner can sue another. Must you not take the remedy the statute provides?"

Again, in *The Cork & Bandon Railway Co. v. Goode,*[2] which was an action of debt for calls, Jervis, C. J. says, "But for the Act of Parliament, no action could be brought by the Company against one of its own members."

The principle, that where a pecuniary obligation is created by statute, and a remedy expressly given for enforcing it, that remedy must be adopted, was also recognized and acted on in the cases of *The Vestry of St. Pancras v. Batterbury,*[3] and *The Wolverhampton Waterworks Co. v. Hawkesford.*[4]

The language of Parke, B. in *Shepherd v. Hills,*[5] would seem at first sight to support the plaintiff's contention. He says, "There is no doubt that whenever an Act of Parliament creates a duty or

[1] Q. B. 667.
[2] 13 C. B. 834.
[3] 2 C. Bench, N. S. 477.
[4] 6 C. B. N. S. 356.
[5] 11 Exch. 67.

obligation to pay money, an action will lie for its recovery, unless the Act contains some provision to the contrary. It is true that this statute gives a power of distress, but that is clearly a cumulative remedy."

That, however, was not an action by a Corporation against one of its members—which is not unimportant; and, moreover, the statute expressly authorized the penalties to be recovered by action of debt, or to be levied by distress—so, I do not see how there could have been any question about the right of action. In *The Cork & Bandon Railway Co. v. Goode* (*supra*), Maule, J. says, "If an Act of Parliament says that certain persons shall pay certain moneys, and nothing more, debt undoubtedly is the appropriate remedy. The statute creates the debt."

If, in the present case, the Act had merely authorized calls to be made, and directed the payment of them, I should have had no doubt about the right of the Company to sue; but here the Act says "something more"—namely, that in default of payment, the shares may be sold. It may be said that this is only permissive; but there are many cases where the word "may" in a statute, has been construed to mean "shall;" and where there is no remedy to recover the calls, except the one expressly given by the statute, it must have that construction, and might be read as conferring a power, and not as giving a discretion. I can find no English case where an action of debt has been held to lie against a stockholder in a Company for an assessment on his stock, unless the right to sue is expressly given by the Act of incorporation.

There is no uniformity in the several acts of Assembly in this Province incorporating railway and other companies, in the mode of recovering calls. Some authorize an action to be brought against the shareholder—as the European and North American Railway Company, 14 Vict., c. 1; the Woodstock Railway Company, 27 Vict., c. 57. While others—as the St. Andrews and Quebec Railway Company, 6 Wm. 4, c. 31; the St. Stephen Railway Company, 27 Vict., c. 56; the Albert Railway Company, 27 Vict. c. 58; and the New Brunswick Railway Company, 33 Vict., c. 49—only authorize the sale of shares in case of non-payment of an assessment. So the Fredericton Boom Co., 7 Vict., c. 34; the Nashwaak Boom Co., 8 Vict., c. 55; the South Bay Boom Co., 10

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Vict., c. 72, only authorize a sale of the shares in case of non-payment of the assessments; but by the act 11 Vict., c. 49, to amend the South Bay Boom Co. Act, express power is given to sue the shareholders in case of non-payment of calls. It is clear, therefore, that the particular act of incorporation in each case must be looked to for the remedy, in case of default of payment; and I am of opinion that, as the act incorporating this Company, imposes the obligation to pay, and at the same time directs a particular remedy in case of non-payment, the remedy so pointed out must be followed, the relation existing between the shareholder and the company having been created by the statute, and there being no liability independent of it.

The next question is, whether the Act 32 Vict,. c. 54, gives a right of action. This act recites that it is doubtful whether the subscribers for stock can be made liable for the amount subscribed by them, by reason—First, that the whole capital stock of two millions of dollars had never been subscribed; Secondly, because it is doubtful whether any assessments on the subscribers could be made till $50,000 of the stock had been paid in; and thirdly, because it was doubtful whether the notices of assessment on the shares had been regularly made and given, as required by the act of incorporation; and then enacts in section 1, That the "subscriber to shares in the capital stock shall be liable to the assessments and calls for payment of said capital stock made or to be made, in the same manner and to the same extent as if the whole amount of two millions of dollars of said capital stock had been subscribed for and taken up, and the fifty thousand dollars of said capital stock had been paid in to the Treasurer of said company in the manner and at the time required by said recited act, and as if the notice and notices of the calls and assessments had been made and given as required by said recited act."

Section 2 declares that all acts done or ordered to be done by the Company in the exercise of the rights and powers given by the act of incorporation, shall be as legal and correct as if the two millions of dollars of stock had been subscribed for, and the fifty thousand dollars paid in at the time and in the manner required by the act.

Section 3 enacts that to entitle the Company to recover against

any subscriber or stockholder, a notice shall be given by the President of the Company in one or more newspapers published in St. John, for two calendar months, which notice shall specify the amount of assessment, shall require the same to be paid to the Treasurer; and from and after the expiration of the said two months publication, the "Company shall be entitled to sue for, recover and receive from any subscriber, the amount due for unpaid subscribed stock which may have been subscribed for by such subscriber, in the same manner as if the call for assessment had been regularly made and published, or served in accordance with the strict requirements of the Act incorporating the said Company."

The words of this section taken by themselves, would certainly seem to shew that the Legislature intended to give a right of action against the stockholders for the amount of unpaid stock, and the words "sue for," would appear to have been used for that purpose; but, inasmuch as the recital of the Act shews that the object of the Legislature was only to provide a remedy for three impediments which stood in the way of any proceedings to recover the assessments, that nothing is said in the recital of any doubt as to the mode of proceeding against stockholders; and no clear intention is expressed to give any different remedy from that provided by the act of incorporation; for the recovery is to be "*in the same manner*" as if the calls had been regularly made, I feel bound to come to the conclusion that the Act of 32 Vict. does not give any right of action against the shareholders. I have no doubt it was assumed by the framer of the Act that there was a personal liability on the shareholders, and therefore it was unnecessary to make any provision in respect to that in the amended Act.

The object of the preamble of an Act is to ascertain what the cases are, to which the Act was intended to apply; but there is no doubt that the enacting words may go beyond the preamble, if such was clearly the intention: *Dwarris Stat.* 660; *Salkeld v. Johnson.*[1] In *Halton v. Cove,*[2] Lord Tenterden says, "The enacting words of an Act of Parliament are not always to be limited by the words of the preamble, but must in many instances go beyond

[1] 1 Hare 196.

[2] 1 B. & Ad. 538.

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it. Yet the words in the enacting part must be confined to that which is the plain object and general intention of the legislature in passing the Act, and the preamble affords a good clue to discover what that object was." If there is any ambiguity in the enacting clause, the preamble of the Act may be referred to in order to ascertain what the intention of the Legislature was. Now, it seems to me that there is an ambiguity in the words of the third section of this act; for, though it authorizes the Company to "sue for" and "recover" from subscribers the amount due for unpaid subscriptions, it is to be *"in the same manner"* as if the calls had been regularly made in accordance with the Act of incorporation; and that was, in the first place by a sale of the stock. The personal liability was only for any balance, in case the stock did not sell for a sufficient sum to pay the assessment. I therefore think that the intention of the Legislature in this case must be ascertained from the recital of the Act, and that it does not shew any intention to alter the mode of recovery given by the Act of incorporation.

Acts which have the effect of changing or taking away existing rights ought to be expressed in clear and unambiguous terms: *Marsh v. Higgins*;[1] *Jackson v. Wooley*.[2]

In *Kimbray v. Draper*,[3] Blackburn, J. says, "Where an enactment changes or takes away rights, it is not to be construed as retrospective, unless there are express words to that effect; but where it only changes the mode of procedure, it is applied to all actions."

To give this Act the construction contended for by the plaintiffs, would impose on the subscribers for stock a liability which did not exist at the time they became subscribers; it would, therefore, affect and change their rights, and, according to the acknowledged rule of construction, it would require clear and express words in the Act to create such a liability; which words, I think, do not exist. I am, therefore, of opinion that no personal liability against the stockholders is given by the Act 32 Vict., c. 54.

On the other point, as to the Act being beyond the powers of the Local Legislature under "The British North America Act,

[1] 9 C. B. 551.
[2] 8 E. & B. 784.
[3] L. R. 3 Q. B. 161.

1867," I do not think there is anything in the objection; but, as that question has been fully dealt with by His Honor the Chief Justice in his judgment, it will be unnecessary for me to make any observations upon it.

WELDON, J. I am of opinion that the action for calls against the defendant is not maintainable according to the Act 27 Vic., c. 43. Section 5 of that Act clearly contemplates a sale of the shares, upon non-payment of the calls after thirty days notice thereof; and nowhere in the Act does it say the shareholders shall be held liable or accountable to the Company for any sum, except the balance remaining after the sale at public auction. The terms of the Act is the contract between the parties: by its provisions they are bound. The Act 30 Vict., c. 12, § 53,[1] in no way alters the liability of the subscribers or shareholders.

It appears that the capital stock for building the road had not been subscribed and paid in agreeably to the Act of incorporation; nor was the assessment made on the subscribers to the capital stock to the extent required; and doubts existed as to the notice of assessment being regular, and an application was made to the Legislature to remedy these deficiencies and irregularities, and an Act was passed in 1869, which recites all these doubts, and enacts that subscribers shall be held liable in the same manner and to the same extent as if the whole capital stock had been subscribed, and notices of the assessment on shares had been given; and that the respective shareholders or subscribers to the said capital stock shall be liable for assessment and calls for payment of said capital stock made or to be made, "in the same manner and to the same extent" as if the whole $2,000,000 had been taken up and $50,000 paid in. The notice to be given is, by the third section, altered; but the liability of subscribers or shareholders is not altered. Every section speaks of the liability of shareholders and subscribers being in the *same manner and to the same extent,* in

[1] Section 3 enacts, that "notwithstanding the provision of the fifth section of an Act passed in the said twenty-seventh year of Her Majesty's Reign, intituled 'An Act to incorporate the European and North American Railway for extension from Saint John, Westward,' the Directors may restrict the assessment or calls to and upon one half of the capital stock, *bona fide* taken and subscribed, amounting to $250 000, and postpone the assessment and calls upon the other half to a later period."

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no wise altering their liability except for the balance that may be unpaid on the assessment after the sale of the stock.

It was contended by the counsel for the plaintiffs that the bye-laws of the Company and their power to make calls created in the defendant a liability in law. But the bye-laws could not alter the liability of the subscribers or shareholders from what the Act of incorporation created, and the liability on which this kind of action must rest is entirely the creation of the statute. In the case of the *Wolverhampton Water Works Company v. Hawkesford,* which was an action for calls, Lord Chief Justice Cockburn says: "The liability on which this kind of action must rest is entirely the creature of the statute." . The plaintiffs must, therefore, show the liability of the defendant to pay these calls in accordance with the terms of the Act of Assembly creating the Company. Not having done so, this action is not maintainable. I think it unnecessary to make any observations on the other question raised by the defendant.

FISHER, J. Assuming that no action would lie for calls under the 27th Victoria because of the non-compliance with its provisions in several respects, the plaintiffs' right to recover must depend entirely upon the 32 Victoria, to which several objections have been taken. It is said to be *ultra vires;* and, if it is not, that the Act itself does not sufficiently cure certain defects in the proceedings of the plaintiffs, that there are other conditions precedent to the plaintiffs' right to recover which are not stated in the preamble, and, therefore, that the enacting clauses of the Act do not operate to remove that difficulty, but only the defects which are so stated in the preamble, and that, in any state of things, the plaintiffs cannot recover for calls until after the stock has been forfeited and sold. By the British North America Act, section 92, clause 10, exclusive power is conferred upon the Local Legislature to make laws in relation to local works and undertakings, "other than lines of steam or other ships, Railways, Canals, Telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province." The object of this section was to limit the power to authorize such works to the Parliament whose authority extends over the whole Dominion.

This railway neither connects the province with any other, or extends beyond its limits. The Act of incorporation gave authority to construct a road from Saint John, Westward, to the boundary of the United States, all within the Province, and is, therefore, in my opinion within the powers conferred upon the Local Legislatures to pass. Any other construction in relation to the British North America Act would lead to the deprivation of the Legislature of much of its authority to incorporate railway corporations; for most of the railways connect with roads which extend beyond the limits of the Province.

It is urged that, assuming the Act 32 Vict. to be in force it does not cure all the defects in the proceedings, and, if it does, that no action will lie for any call until the stock has been forfeited and sold, and then only for the balance.

Authors who have treated upon the law of corporations appear to have assumed that the corporation has a remedy by action at law against a stockholder for calls upon his stock. Upon a careful examination of the authorities to which these writers refer, the doctrine does not appear to be so fully sustained as it is stated. Still I incline to the opinion that, where a call for stock is made on the stockholders, the law will imply a legal obligation to pay, for which an action will lie. In *Shepherd v. Hills*,[1] Parke, B. says: "There is no doubt that whenever an Act of parliament creates a duty or obligation to pay money, an action will lie for its recovery, unless the act contains some provision to the contrary. It is true the statute gives a power of distress, but that is clearly a cumulative remedy." I do not think the right to maintain this action depends upon the question whether the Corporation have a cumulative remedy by action for calls or not, otherwise I should refer more fully to many other authorities which I have examined. Whatever may be the state of the law in that respect, I am of opinion that the 32 Victoria has made sufficient provision to meet the case. It appears to assume that the Company can recover for calls by action at law, irrespective of the form conferred by the Act of Incorporation. So far as I can ascertain the meaning of the 32 Victoria, the Legislature intended that the remedy given by the Act of incorporation should be cumulative.

[1] 11 Exch. 66.

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The Legislature appear to have had this object in view, viz., the making valid of the proceedings of the Directors in relation to the calls, for the purpose of enabling the Company to forfeit the stock of the defaulters, and also for the purpose of enabling the Company to sue for calls. The first section removed the difficulties of proceeding for the calls under the Act of incorporation, and when the legality of the preliminary proceedings could not be disputed, the Company could enforce the call under the provisions of section 5 of the 27 Vict., the Act of incorporation, which authorizes the sale at Public Auction of the shares of delinquent subscribers for stock, and provided that, in the event of the share not selling for sufficient to pay the assessment, the delinquent shareholder should be held accountable to the Company for the balance. It is not disputed that, had the proceedings been regular, and had the terms and conditions of the Act of incorporation been complied with, the Directors were empowered to forfeit the stock of delinquent subscribers, and, after sale at public auction, to recover the balance, if any, due, by action at law.

It was the object of the first section of the 32 Victoria, so to legalize the proceedings that the Directors might exercise the power conferred upon the Company to forfeit the stock, and recover for any balance due on the sale of the stock by action at law. After the defect in the proceedings had been cured by that section, the Directors had full power under the Act of incorporation to forfeit the stock, and proceed by action at law to recover any balance due on the sale of the stock.

Had the Legislature intended that the Company should have no right of action for calls until the stock had been forfeited and sold, and then only for the balance, if any, it would have legislated no further, as that object could have been fully attained under the provisions of the Act of incorporation, when the validity of the proceedings could not be disputed. Any further legislation for that purpose would be useless. But there is a further provision in the third section of the 32 Victoria, which declares what shall be done to entitle the Company to recover against a subscriber or stockholder. "To entitle the Company to recover"—the very language employed shews what was the intention of the Legislature. "To recover" means ordinarily to sue for, to obtain by

some legal proceeding. In Worcester's Dictionary the word "recover" is said in law to mean, "to obtain by course of law; to obtain by means of an action or by the judgment rendered in an action." The word could not surely have been intended to apply to collecting the calls by forfeiture and sale of the stock. After the publication of a notice from the President for two months, the Company are entitled to sue for, recover and receive the amount due for unpaid subscribed stock in the same manner as if the calls had been regularly made and published, or served, according to the requirements of the Act of incorporation. The form of the notice in this section shews what was the object intended. It must specify the amount of the assessment, and upon what part of the stock, and require it to be paid to the Treasurer. This surely can mean nothing else than the whole amount of the assessment made on the stock, which is required to be paid to the Treasurer, and not the balance, after deducting the amount realized from the sale of the stock. It is not consistent with the particularity with which the contents of the notice are stated, that, if it were simply intended to authorize the recovery of the balance, if any, due after the sale of the stock forfeited, that it would not have stated so specifically. But, it is said that the words "in the same manner" must refer to the recovery for the balance after forfeiture and sale. It appears to me that, as the Act assumes the right in the first instance to recover calls by action, and the third section declares that it may be done under the simple notice pointed out, in the same manner, it means by the same form of action or mode of recovery, or as effectually as if all the provisions required by the Act of incorporation had been regularly taken. If the section was not intended to enable the Company to recover the calls by action at law it was so much useless legislation, because, under the Act of incorporation there was ample power to sue for the balance. This appears to me to be the only common sense mode of construing these two sections, and no Act should be construed contrary to common sense.

I think that the enacting clauses of the 32 Victoria are so explicit in their terms that their meaning cannot be controlled by the preamble; that the first section cured the defect in the proceedings in regard to the capital stock subscribed and paid in,

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EUROPEAN AND NORTH AMERICAN RAILWAY CO. v. THOMAS.

and the assessments and the mode of making them, and the notices, and that, under that section, the Company had power to forfeit the stock, and sue for any balance due after the sale in the manner prescribed by the fifth section of the Act of incorporation; that the third section empowers the company to sue for calls after giving two months' notice of the amount of the assessment in a newspaper published in Saint John. As it appeared in the case that the notices required by the Act had been given, I am of opinion that the plaintiffs are entitled to recover, and that the rule for a nonsuit should be discharged.

WETMORE, J. took no part in this case.

Rule absolute for nonsuit.

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HENDERSON *v.* THE MAYOR, &c. OF ST. JOHN.

Negligence—Legal Right—Obligation.

The defendants, having authority by law to lay out and open streets in the City of St. John, laid out a street through an uninclosed and hilly piece of ground. Several houses were built on the line of this street, but the land in the vicinity remained uninclosed, and people were accustomed to pass over it as they pleased, in various directions, though there was no right of way, except by the street. The defendants, having determined to level and improve the street, made cuttings through the hill for that purpose—several feet deep in some places. The plaintiff had formerly lived in the neighborhood of the street, and had been in the habit of crossing the open space; and after the street was levelled, she was crossing the open space in the night, and not being aware of the cutting, fell into the street and was injured.

Held, per Allan, J. (Fisher, J. *contra*), That the plaintiff had no legal right as against the defendants, to cross over the land; that there was, therefore, no legal obligation on the defendants to light the street, or to fence the sides of it against persons using the adjoining lands; and, therefore they were not liable for the plaintiff's injury.

This was an action for negligence in not properly lighting or guarding a street in the City of St. John, called Brindley street, which the defendants were cutting down and excavating, whereby the plaintiff fell into the cutting in the night and was injured.

This street extended over a hilly and rocky piece of ground between Waterloo street and the City road (so called), and had been used by foot passengers for several years, and some small houses were built upon the line of it, principally on the north side; but it had not been levelled or worked upon. In 1869, the defendants resolved to level and grade the street according to

a plan, and a contract was entered into for that purpose, under which excavations of various depths were made, in order to form a level road. A person named Kee had a house on the south side of Brindley street, about 70 feet from its intersection with Waterloo street. The end of Kee's house was on the line of the street, and the cutting there was about 6 feet deep; the hill sloped off gradually from Kee's house towards Waterloo street, and, at the junction there, it was nearly, if not altogether, level with the street. The plaintiff had formerly lived in the neighborhood, and had been in the habit of going to Kee's house, and of passing backward and forward by the foot-path through Brindley street between Waterloo street and the City road. The entrance to Kee's house was at the Southwestern end, and the usual approach to it from Waterloo street was by a path diverging from the Southerly side of Brindley street, near its intersection with Waterloo street, and running diagonally across an open space to the Southwestern end of the house, which was about thirty feet from the street. The plaintiff had been absent from the neighborhood about a year. She returned in November, 1869, and one evening after dark, intending to go through Brindley street to the City road, she called at Kee's house, going by this path across the lot which she had been accustomed to use. When she came out of the house she walked towards Brindley street along the side of the house, and, not being aware of the excavation, she fell into the street at the northeastern end of the house, and was seriously injured. The land in the vicinity of Kee's house on the southwestern side of the street was uninclosed, and a kind of common—people passing over it in any direction, as they pleased.

The case was tried before ALLEN, J., at the St. John Circuit in January, 1871, when a verdict was found for the plaintiff, with leave to the defendants to move to enter a nonsuit on the ground that, as the injury sustained by the plaintiff was not caused by any obstruction in the street or while she was passing upon the street, the defendants were not liable.

A rule *nisi* was obtained in the following term of the Court, against which, in Easter term.

D. S. Kerr, Q. C., shewed cause.

B. L. Peters, Q. C., was heard in support of the rule.

Cur. Adv. Vult.

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HENDERSON v. THE MAYOR OF ST. JOHN.

The Judges now delivered the following judgments:—

ALLEN, J. It is quite clear that the defendants in cutting down and levelling the street, were doing a lawful act—not only authorised by the general powers of their charter, but by the express words of the Act 9 Geo. 4, c. 4, which recognizes their right to cut down, and alter the level of the streets in the city. The question now is, whether they have been guilty of any negligence in the performance of the work?

At the time the plaintiff received the injury, she was not using the street, nor in the exercise of any public right; and, in this respect, the case differs from any that I have been able to find. There was no obstruction in the street itself; and, if the plaintiff had not deviated from the street, the injury would not have happened. If, as is contended, the defendants were bound to keep a light in the street, or to erect a fence on the side of it, to prevent persons on the adjoining lands from falling into the excavation while the street was in the course of completion, they will be equally bound to continue such light or fence until the adjoining lands are fenced by the proprietors,—for the danger will be as great after the street is finished as while it is in course of construction. The principle which governs cases of this kind is, that, at the time the injury was received, the plaintiff was in the exercise of a right, and that the defendant unlawfully obstructed that right. In *Corby v. Hill*[1] the defendant was held liable for an injury caused to the plaintiff by placing an obstruction on a private way leading to the house of the owner of the land, though the obstruction was placed there by the owner's permission. The reason for this decision was, that, as the owner of the soil had held out this road as a means of access to all persons having occasion to go to his house, he would not be justified in placing any obstruction across the way, whereby injury would be occasioned to any person using it for that purpose; neither could a third person acquire any right to do so by permission of the owner of the soil. *Indermaur v. Dames*[2] was decided on the same principle.

In *Hounsell v. Smyth*,[3] the owner of uninclosed waste land, on which was a quarry, was held not bound to fence it against a

[1] 4 C. Bench, N. S. 556.
[2] 1 Law R. C. P. 274.
[3] 7 C. Bench, N. S. 731.

person who, in crossing the waste in the night, accidentally deviated from the road, and fell into the quarry and was injured. Williams, J., said that it was not the fault of the defendant that the plaintiff was ignorant of the existence and locality of the quarry, and for the danger he incurred by crossing the waste in the dark. The principle of that case is not altogether inapplicable here.

Another class of cases is, where the owner of land, abutting on a public way, is liable for an injury caused by an excavation made by him so near the way that a person passing on the way falls into the excavation, without any negligence on his part. See *Barnes v. Ward*,[1] and *Cornwell v. Metropolitan Commissioners of Sewers*.[2]

In all the cases where a liability has been held to exist for injuries of this kind, the plaintff has had a right to be where he was, at the time the injury happened, either because there was a public or private way over the land which he was using, or because he was there, using the land with the consent of the owner, as in *Corby v. Hill* (*supra*).

In the present case, the defendants, in making the excavation, interfered with no legal right of the plaintiffs; for, though the plaintiff and others may have been in the habit of crossing, in different directions, over the open space through which this street was laid out, no right of way over any part of the land, except the street itself, had been acquired either by user or dedication. There are many cases where one person sustains damage by the act of another, and yet has no remedy—it is *damnum absque injuria*. In *Swan v. The North British Australasian Co.*,[3] Wilde, B., says: the action for negligence proceeds upon the idea of an obligation on the part of the defendants towards the plaintiff to use care, and a breach of that obligation to the plaintiff's injury." And, in *Dutton v. Pawles*,[4] it is said, that negligence creates no cause of action, unless it involves some breach of duty.

Now, what obligation was there on the part of the defendants towards the plaintiff, crossing over the lots in the neighborhood of this street, to fence the side of it, or to keep a light there? Unless the plaintiff had the *right*, as against the defendants, to be

[1] 9 C. Bench 392.
[2] 10 Exch. 771.
[3] 7 H. & N. 636.
[4] 30 Law J. Q. B. 169.

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where she was at the time of the accident, there is no such obligation. By the term *right,* I do not mean the mere tacit permission of the owner of the land, but a legal right to go there, the interference with which would have given the plaintiff a right of action. As far as I can gather from the cases, the principle seems to be this, that if a person has a legal right to pass over land, and the owner of the land or any person by his authority, places an obstruction upon it, by means of which the person passing over the land is injured, he has a remedy, because there has been an interference with his *right;* but, if he has no such right to be on the land, the rule, *caveat viator,* applies.

In the cases cited by Mr. Kerr from *Sherman and Redfield on Negligence,* the injuries happened to persons travelling on the highway, where they had the legal right to travel, and the injuries were caused by some obstruction or defects in the highway itself,—in both of which particulars this case is entirely distinguishable from the cases there cited.

However much the injury which the plaintiff sustained is to be regretted, I cannot satisfy myself that the defendants have been guilty of any breach of duty: therefore I think the rule for entering a nonsuit should be made absolute.

FISHER, J.—After stating the facts in the case, continued:—The defendants were cutting down the street lawfully, within the power conferred upon them by their charter and by the 9 Geo. IV, which recognizes their right to cut down, alter, and level the streets in the city: and the question is, whether they have been guilty of any negligence in the performance of the work.

The learned Judge directed the jury that the plaintiff was entitled to recover, unless, by her own negligence or want of care, she contributed to the accident. They must consider whether, in going there on a dark night, it was not negligence in the plaintiff not to enquire into the state of the road, and, in considering this, they were to bear in mind that she was not astranger there, but had travelled the road often before. The jury found for the plaintiff, thereby negativing any idea of contributory negligence on her part, and leave was granted to enter a nonsuit, if the Court should be of opinion the plaintiff was not entitled to recover.

It was contended in the argument, that there was no duty on

the part of the Corporation to guard the street, or to put up any lights or signals of warning during the progress of cutting it down, as such an obligation would require the keeping up of fences or guards on many of the streets in St. John in all future time, whenever they were cut down. I am unable to arrive at any such conclusion; and, in my opinion, the present case does not necessarily raise that point, or invite any such consideration. I am not called upon to express my opinion as to the duty of the Corporation, after a street has been cut down, and completed, and fit for travel; but simply to inquire what was its duty when the very work itself, and the mode of doing it, made it dangerous. The street in question was a public thoroughfare, where the plaintiff and others had a right to pass, and where waggons went through occasionally. She was, then, in the exercise of her lawful rights, and she had a right to use that highway. The Corporation were doing a lawful act, but were they doing it in a lawful manner? In the day time there could be no difficulty; but, in the night, when there were, by the testimony of their own surveyor, piles of stone in the street, and when the whole street was so disturbed that a person could not go through in the day time without seeing it,—was that a state of things that should exist in the dark, foggy November night, without even a warning to the many travellers who might pass along? I think not. Was not the pile of building stone in the street a nuisance, and would not any injury derived from such nuisance be the subject of an action at common law? See *Hardcastle v. South Yorkshire Railway Co.*[1] In *Swan v. North British Australasian Co.*[2] Wilde, B., says, the action for negligence proceeds from the idea of an obligation toward the plaintiff to use care, and the breach of that obligation to the plaintiff's injury. See also per Willes, J., in *Vaughan v. Taff Vale Railway Co.*[3] In the opening and levelling of the street, was there not an obligation on the part of the Corporation to all persons who had the right to use it, and of necessity to the plaintiff, to use care? and can it be said that it was not careless and negligent on their part to leave that street in the condition it was described to be in by their own surveyor, without the adoption of some measure to

[1] 4 H. & N. 72.
[2] 7 H. & N. 625.
[3] 5 H. & N. 687.

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notify the public of its condition? It does not appear what were the particular duties of the city surveyor. but, if it was not his duty to look after this matter, the Corporation either have, or should have, an officer to attend to that duty; and, if he has neglected it, they must settle that between themselves. I think it was the duty of the defendants to have affixed a light, or something to warn persons, who might pass along, of the danger. It is said that, as the plaintiff was not passing along the street, but came into it from the side, they are not liable; but it appears to me, from the finding of the jury, the defendants are estopped from urging that. If it was the duty of the defendants to have affixed a light or signal to warn the traveller, and they neglected that, there was negligence on their part; and the jury have found that the plaintiff was not guilty of any contributory negligence. I cannot see how the mode by which she came to the street would affect her right to recover. It is said by Martin, B., in giving judgment in the case of *Barnes v. Ward*:[1] "A trespasser does not forfeit his right of action for any injury sustained;" and it was held the plaintiff was entitled to recover for an injury sustained in consequence of the wrongful act of the defendant, without want of ordinary caution on his (the plaintiff's) part, although the injury would not have occurred if the plaintiff had not trespassed on the defendant's land.

I think it was negligence on the part of the defendants not to put up a light to notify the public of the obstruction and condition of the street, and, if the plaintiff was injured by means of their work, and did not herself contribute to the injury, she is entitled to recover. Public bodies, and others, who have the charge of the roads and highways, too often neglect their duty in this respect, and thereby recklessly expose the lives and limbs of persons who pass over them. In a populous community like St. John, to my mind there is no excuse for those who disregard so reasonable, so simple, and so necessary a precaution, as the affixing of a light or other proper warning to the public, who, in the darkness of the night, pass along a street, when it is encumbered, broken or

[1] 9 C. B. 392.

filled with rubbish or piles of stone. See *Chapman v. Rothwell,*[1] *Corby v. Hill.*[2]

For this reason, I am of opinion, that the plaintiff is entitled to recover, and that the rule to enter a nonsuit should be discharged.

RITCHIE, C. J., and WELDON and WETMORE, JJ., took no part in this case.

The Court being equally divided in opinion, the rule *nisi* was discharged.

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MITCHELL *v.* LAWTHER.

Practice—Non-resident Defendant—Judge's Order—Necessity of obtaining before proceeding with suit—18 Vic. c. 25—Assessment of Damages—Affidavit.

A writ, issued for service beyond the limits of the Province, under the Act 18 Vic. c. 25, was served on the Defendant, in Ireland, on the 19th September, 1870, requiring him to appear within sixty days. On the 17th November following, the plaintiff filed an entry docket in the cause; and on the 12th December obtained a Judge's order authorizing him to enter the cause as of Michaelmas Term then last, to enter a rule to plead on filing a declaration, and, in case the defendant did not plead by the first day of Hilary Term, the plaintiff to be at Liberty to sign interlocutory judgment, and to proceed according to the ordinary practice. The declaration was filed on the 19th December; interlocutory judgment by default was signed on the 8th February, 1871; and final judgment on the 19th May.

Held, (Fisher and Wetmore, J. J., *dubitantibus*). That the plaintiff had not right to proceed in the cause after service of the writ, without a Judge's order; that the order of 12th December did not relate back to the previous entry of the cause; and that, the cause not having been entered in pursuance of the Judge's order, the interlocutory judgment was a nullity.

In assessing damages under the Act after judgment by default, the plaintiff must establish the amount of his debt or damages by legal proof. Where the only evidence of the debt was an account shewing several sums of money due from the defendant to the plaintiff on various transactions, with an affidavit of the plaintiff, that the "account was just and true,"—it was held insufficient, and the judgment was set aside.

A writ issued for service beyond the limits of the Province under the Act 18 Vic. c. 25[3] was served on the defendant in Ireland on the 19th September, 1870, requiring him to appear

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[1] E. B. & E. 169. [2] 4 C. B. N. S. 456.

[3] Section 1st enacts that "in case any defendant in any suit brought, or to be brought in the Supreme Court of this Province, being a British Subject, is residing out of the jurisdiction of the said Supreme Court of this Province, it shall be lawful for the plaintiff to issue a writ of Summons in the form contained in the Schedule to this Act annexed marked (A), which writ shall bear the endorsement contained in said form purporting that such writ is for service out of the jurisdiction of the said Court and the time for appearance by the defendant to such writ shall be regulated by the distance from New Brunswick to the place where the defendant is residing, and it shall be lawful for the Court or Judge, upon being satisfied by affidavit that there is a cause of action which arose

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within sixty days. On the 17th November following, the plaintiff filed an entry docket in the cause; and on the 12th December obtained a Judge's order, by which the plaintiff was to be at liberty *to enter the cause as of* Michaelmas Term then last past, and enter a rule to plead upon filing a declaration, and in case the defendant did not appear and plead by the first day of Hilary Term, the plaintiff to be at liberty to sign interlocutory judgment, and proceed according to the ordinary practice. The declaration was filed on the 19th December; interlocutory judgment by default was signed on the 8th February, 1871.

Final judgment was signed on the 19th May, the damages being assessed by a Judge on the following affidavit:

SUPREME COURT.

PETER MITCHELL, *Plaintiff,*
AND
SAMUEL LAWTHER, *Defendant.*

Peter Mitchell, at present of Ottawa, in the Province of Ontario, but formerly of Newcastle, in the Province of New Brunswick, Esquire, maketh oath and saith that the account hereunt annexed marked **A** contains a true statement of the different accounts due and owing from the said defendant, Samuel Lawther. to this depondent, and also a true statement of the credits, to which the said defendant is entitled from this deponent, to the best of this deponent's knowledge and belief, and this deponent further saith that he had commercial dealings with the said defendant prior to the year one thousand eight hundred and sixty-five, and that in the course of said business the said defendant was in the habit of charging this depenent with interest on all moneys advanced by him to this deponent or in any manner paid by him on deponent's account, and giving this deponent credit for interest upon all moneys

within the jurisdiction or in respect of any contract executed or to be executed in whole or in part within the jurisdiction. and that the writ was personally servec upon the defendant and that reasonable efforts were made to effect personal service thereof upon the defenant and that it came to his knowledge, and either that the defendant wilfully neglects to appear to such writ or that he is living ou of the jurisdiction of the said Court, in order to defeat and delay his creditors, to direct from time to time that the plaintiff shall be at liberty to proceed in the action in such manner and subject to such conditions as to such Court or Judge may seem fit, having regard to the time allowed for the defendant to appear being reasonable and to the other circumstances of the case, provided always that the plaintiff shall, and is hereby required to prove the amount of the debt or damages claimed by him in such action, either before a jury upon a writ of inquiry or before a judge of the said Court according to the nature of the case, as such Court or Judge may direct, and the making such proof shall be a condition precedent to his obtaining judgment."

remaining or being to this deponent's credit in the hands of said defendant; that the said defendant is indebted to this deponent in the said several sums of money contained in the said account hereunto annexed, which said several amounts were remitted by plaintiff to defendant as stated therein, and received by the said defendant for and on account of this deponent, and that on the thirty-first day of December, in the year of our Lord one thousand eight hundred and sixty-four, the said defendant owed and was justly indebted to this deponent in the sum of Three thousand eight hundred and eight pounds and one penny in sterling money, which at nine and a half per cent premium amounts to eighteen thousand, five hundred and thirty-two dollars and twenty-nine cents, currency, for money had and received by said defendant to and for the use of this deponent, as appears by the several items in the said account hereunto annexed, and this deponent further saith, that in accordance with the said dealings between this deponent and the said defendant, this deponent is entitled to recover interest from the said defendant on the said sum of eighteen thousand, five hundred and thirty-two dollars and twenty-nine cents from the thirty-first day of December, in the year of our Lord one thousand eight hundred and sixty-four at the rate of five per cent per annum, and that the amount due this deponent from said defendant for said interest is five thousand eight hundred and thirty-one dollars and thirty cents, and that the whole sum due this deponent from said defendant is twenty-four thousand three hundred and sixty-three dollars and fifty-nine cents, as appears from the said account hereunto annexed marked **A.**

(Signed.) P. MITCHELL.

A.

SAMUEL LAWTHER, ESQ.

To P. MITCHELL, Dr.

1864.							
Dec. 31.	To freight of deals to James Lemon & Son,	£1265	12	9			
	Sales of balance of cargo of "E. Caldwell,"	1515	7	11			
					£2781	0	8
	Amount of purchase money paid Meehans for my half of "Star of Derry,"	£2250	0	0			
	Invoice of cargo of same	770	18	4			
	Freight of "Star of Derry," valued at £856. My half,	428	0	0			
					3448	18	4
					£6229	19	0

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Cr.

1864. April 30.	By am't. of your account,	353	14	3		
	Int. on £104 balance of acc't. included in £353.14.3 from 1st Jan., 1864 to 31st Dec., 1864	5	4	0		
		358	18	3		
	CHARGES.					
	Duty harbor dues, advertising, storage, etc., with other charges, including Commission on "E. Caldwell,"	186	7	1		
		545	5	4		
April 30.	By charges on "Star of Derry," including half insurance on same	376	13	7		
	Commission and amount to cover sundry charges on above transactions,	250	0	0		
	Value of Crocker's outfit,	250	0	0		
	Amount accepted for Geo. Wright & Co., as directed by me	1000	0	0		
					2421	18 11
	Balance due 31 Dec., 1864, $18,532.29,	2808	0	1		
	To interest from 1st January, 1865, to 17th April, 1871, at 5 per cent, equal to $5831.30	1198	4	3		
	Sterling,	£5006	4	4		
	At 9½ per cent equal to $24,363.59.					

(Signed.) P. MITCHELL.

Application having been made to the Chief Justice at Chambers for an order to set aside the service of the Summons, and interlocutory and final judgments, the matter was by him referred to the Court.

Oct. 11, 1871. *S. R. Thomson, Q. C.,* and *C. W. Weldon,* for the defendant, contended. 1st. That before a writ for service beyond the jurisdiction of the court can issue at all, there must be a

Judge's order. 2nd. That the affidavit of service was defective in not stating that the original writ was exhibited to the defendant, and also in not containing a statement that the copy served bore upon its back the same endorsement as the original, which was required by the Act. 3rd. That the writ was bad in that it gave no information to defendant of the cause of action. 4th. That the affidavit on which the damages were assessed was defective, as it did not state a sufficient cause of action. 5th. That the damages cannot, under the Act, be assessed on affidavit—it must be by *viva voce* testimony. 6th. That the cause could not be entered prior to getting the Judge's order. 7th. That the interlocutory judgment should state for what it was signed, that is, either for want of appearance or plea.

A. L. Palmer, Q. C., for the plaintiff.

Cur. Adv. Vult.

The Judges now delivered the following opinions:—

WETMORE, J. A summons was granted in this cause by the learned Chief Justice calling on the plaintiff to shew cause why the judgment in this cause should not be set aside for irregularity; or why the defendant should not have leave to appear and defend the action; or why the proceedings should not be stayed until an application can be made by the defendant to the Court to set aside such judgment; and for leave to come in and defend this action; and by the Chief Justice directed to be entered on the motion paper, that the matter might be heard before the Court.

Several objections to the correctness of the proceedings were taken, and, as I understand, my learned Brethren all agree, and I quite concur with them, that the proceedings are regular down to, and including the order of Mr. Justice Weldon of the 12th December, 1870.

It is contended there is no entry docket properly filed. The Rule of Court respecting dockets and fees, Allen's Rules p. 2, requires that every attorney of this Court shall enter the returns and file the writ or process in all actions which have not been agreed, *and in which they intend to proceed,* and shall make a docket of all such returns and rules, and on the last day of the

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term shall deliver the same to the clerk of the Court, and shall pay to the clerk his own fees as well as those of the Judges and criers in such actions. The act under which these proceedings are had, 18 Vic. Cap. 25, intituled "an Act relating to the service of process," by Sec. 1, among other matters, empowers the Court or a Judge to direct from time to time that the plaintiff shall be at liberty to proceed in the action in such manner, and subject to such conditions as to such Court or Judge may seem fit, having regard *to the time allowed for the defendant to appear* being reasonable, and to the other circumstances of the case, provided always that the plaintiff shall, and he is hereby required to prove the amount of the debt or damages claimed by him in such action, either before a jury upon a writ of enquiry or before a Judge of the said Court according to the nature of the case, as such Court or Judge may direct, and the making such proof shall be a condition precedent to his obtaining judgment.

It appears that an entry docket was filed by Mr. W. H. Tuck, the plaintiff's attorney, on 17th November, 1870, on which this cause was entered: "Peter Mitchell vs. Samuel Lawther, writ of summons issued 29th August, 1870, for service out of jurisdiction of Court. Writ served 19th September, 1870. Rule to plead." Now, so far as the rule is concerned, the party intending to proceed with the suit has made a docket, and it has been prepared and filed with the clerk, containing all the requisites of the rule: it is true the writ of summons does not appear to have been filed with such docket, but, in my idea of the practice, it is quite usual to file the writ as a matter of course, after the time pointed out by the rules in this respect, if the entry docket has been duly filed. The plaintiff's attorney evidently intended to proceed in the suit, and he is aware of what has been done with the process,—that it has been served, and I think the entry he has made is a compliance with the rule. It may be said, the plaintiff cannot enter the cause without a Judge's order, but I am of opinion that he does not require a Judge's order to comply with the rule. The rule is imperative. The attorney shall make the entry in all causes in which he intends to proceed. I think he had as much right to enter the cause without any Judge's order as he had to issue the writ,—nay, having issued the summons and having it in his

possession with an affidavit of service, and it being his intention to proceed, it was his imperative duty to enter it. Suppose the Judge declined to give an order to proceed, would the attorney be justified in not entering the cause, the effect of which would be to evade the payment of fees? And further, I think the filing of the Judge's order should be considered a sufficient entry, even if it did not render legal the previously filed entry docket—supposing such entry docket was illegally filed without a Judge's order. The Judge is authorized to prescribe the manner, and it seems to me the plaintiff has complied, to the signing of interlocutory judgment, with the letter of the Judge's order—apart from the question of the entry docket. The Judge's order does not require any entry docket, in words: it says the plaintiff shall be at liberty to enter his cause as of Michaelmas Term, and enter a rule to plead, *upon filing a declaration.* The Judge's order itself is filed: a rule to plead is entered on the back of the declaration. The defendant does not appear and plead by the first day of Hilary, common bail is filed, and also an appearance under the Act of Assembly—so far the Judge's is complied with, and interlocutory judgment is duly signed in pursuance of the order, and I think the proceedings are regular. The assessment of damages, I think, cannot be sustained. I doubt if, in any case, such an affidavit would be sufficient, but, in the present case, the description of proof is not such as the Act in words requires, as a condition precedent to the plaintiff obtaining judgment.

The defendant's affidavit of merits is unsatisfactory. It states —referring to the plaintiff's affidavit—the statements within the affidavit, on which damages are assessed, are in great part utterly false, without stating in what particular it is false. The affidavit does state that, so far from owing anything to the plaintiff, the defendant is a creditor of the plaintiff's to the extent of four hundred pounds sterling and upwards, irrespective of some two hundred and fifty pounds sterling for attending to some law suits which are mentioned in the affidavit. Arch. Prac. 11 Ed. page 978, states that the affidavit of merits must in express terms state that the defendant has a good defence upon the merits, for which *Lane v. Isaacs*[1] is cited. The defendant makes no such

[1] 3 Dowl. 652.

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allegation. The defendant does, however, state that if the judgment is allowed to stand and the defendant is not permitted to come in and defend himself, a gross and outrageous wrong will be inflicted upon him by the plaintiff; that the defendant is prepared to shew, and, if permitted, will shew that he does not owe anything to the plaintiff, but that Mitchell is indebted to him in the amount before stated. I am, however, of opinion that the defendant should be let in to defend, but it must be on the terms of his duly entering an appearance. And, when such appearance is duly entered, the interlocutory judgment to be removed, and subsequent proceedings to be set aside,—and, under all the circumstances, the costs should be costs in the cause.

FISHER, J. The statute authorizes the issuing of the writ and prescribes the form, and enacts that the time for appearing shall be regulated by the distance from New Brunswick to the place where the defendant resides. This is in the discretion of the attorney, subject to the subsequent control of the Judge. No one can say that, with the present mode of communication, sixty days was not a reasonable time for a defendant residing in Belfast, Ireland, to appear. Several objections have been made to the order of the Judge. Without expressing an opinion as to the availability of these objections, in the present stage of the case, even if they were once valid, I am of opinion that they are groundless. It is urged that it does not appear that the defendant was a British subject. I think, had I been drawing the order, I should have recited that fact. Before the Judge could have made the order, however, he must have been satisfied by the affidavit that all the conditions provided by the Act had been complied with, one of which was that the defendant was a British subject. Can any one doubt, who reads the affidavit and papers, the correctness of his conclusion? I can only say that, if the same state of facts had been presented to me, I should have made the same order. It is said that there has been no entry of the cause according to the practice of the Court. I am not sure that the filing of the Judge's order and the declaration with the indorsement, "Per curiam—Rule to plead," is not of itself a sufficient entry. In my view of the case it is not necessary to discuss or to determine that question. The plaintiff's attorney, in compliance with the rule of

Court, filed the summons with another writ, and entered both causes within the thirty days of Michaelmas Term, 1870. By filing the declaration and Judge's order he adopted it as the entry of the cause, which I think he might well do. I am unable to discover any inconvenience in this mode, or any possible disadvantage the defendant could be put to by it, or any irregularity whatever. Suppose the defendant had, before February, 1871, searched for the proceedings in the case to ascertain whether he was bound to appear to the writ served upon him, his first enquiry would be for the Judge's order. After reading it, he would enquire whether there was any entry of the cause of Michaelmas Term then last past. Would not the clerk turn at once to the plaintiff's attorney's entry docket of that term, and produce this entry, stating that the cause had been entered as of Michaelmas Term? With these facts before him, without any reference to the endorsement on the declaration, can it be doubted that he would have appeared? And I think he was bound to appear. It is urged that a declaration in a suit under the Act cannot be filed *de bene esse,* and the defendant must have notice of the filing before proceeding to interlocutory judgment. If such were decided to be the law, it would deprive many plaintiffs of the benefit of its provisions. It appears to be in the power of a Judge so to direct if he so determine; but that would only occur in some special and exceptional cases. The rule applicable to the filing of declarations *de bene esse* must be modified and adapted to meet the requirements of the Act. From the best judgment I can give to this case, I have arrived at the conclusion that a plaintiff proceeding under the Act has thirty days from the day of the making of the Judge's order to file the declaration *de bene esse,* and that his declaration should be on file thirty days, before he can sign interlocutory judgment, and then not till the expiration of the time for appearance prescribed by the Judge in the order. The interlocutory judgment was not filed until after the expiration of the time fixed by the Judge for the defendant to appear, and after the declaration had been on file thirty days. The proceedings were, therefore, thus far regular. I do not think it necessary to discuss the mode in which the damages were assessed, in the view I take of this case. It is a question, whether the damages were sufficiently proved, or not; and whether, if there

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be a doubt upon that point, the proof having been sufficient to satisfy MR. JUSTICE WELDON'S mind, the matter can be opened, and to what extent. It is said that, in a case of this kind, the damages cannot be assessed by a Judge, and the same principle would apply as to an enquiry by a jury on the testimony of the plaintiff. Proceeding under the Act is stated to be no new jurisdiction, merely a new process: *Hutton v. Whitehouse.*[1] I am unable to discover any principle in reason or in law that should distinguish the assessment of damages in a case under this Act from any other. The rights of a defendant, resident in Restigouche or Albert, are just as sacred as if he lived in Newfoundland or Australia. The nature of the proof required by the Act appears to be in the discretion of the Court or Judge. I know of no case, in which the damages in an action of assumpsit can be assessed by a Judge or on a writ of enquiry, without proof. The object of the Act 19 Vic. c. 41,[2] in further amendment of the law was to enable a plaintiff or defendant to make proof by his own oath. Suppose this was an action of trespass, and the plaintiff on the trial was called, and stated that the defendant had entered his enclosed meadow and cut 10 tons of hay, worth $12 per ton, and carried it away, or an action of assumpsit, and the plaintiff had stated that he had lent a sum of money to the defendant, or had paid it to other persons for him and at his request; would any counsel contend that the trespass in the one case, and the indebtedness in the other, had not been proved? Would any Judge nonsuit the plaintiff for want of proof? If that is so, then is not the plaintiff's affidavit of the debt, due him by the defendant, proof for a Judge to assess damages, or for a jury to enquire and assess? As I think the proceedings regular, I have not discussed the question of waiver, which was argued, not thinking it necessary to enquire how far, and to what extent, the distance and the conduct of the defendant would waive irregularities that I do not think exist. The defendant appears to have been advised to disregard the process of the Court,

[1] 1 H. & N. 32.

[2] Section 1 enacts, that, "On the trial of any issue joined, or of any matter or question, or any enquiry arising in any suit, action, or other proceeding in any Court of Justice, * * * the parties thereto, and the person in whose behalf any such suit is brought or defended * * shall be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the suit, action, or other proceeding."

but, under all the circumstances of the case, I am of opinion that he should be allowed to come in to defend the action upon terms, that, on the defendant appearing, the judgment may be set aside, and that the costs of both sides should be costs in the cause.

WELDON, J. The defendant admits a paper was served upon him in Ireland in September, 1870, that he took no steps about it, and in August, 1871, upon his arrival in New Brunswick he heard of the judgment, and upon searching at the office of the Clerk of the pleas, he found a judgment had been entered up against him for $24,363.59 and costs of suit. He denies having any other notice of the action except the papers served upon him, and that he is indebted to the plaintiff in any sum whatever. Several objections were made as to the course of procedure by the plaintiff, and that the order of the Judge was not in conformity with the Act, 18 Vic. cap. 25, entitled "an Act relating to the service of process." I am of the opinion the proceedings of the plaintiff have been in conformity with the directions of the Act up to the time of making proof of the damages claimed by him in such action. Sixty days was a reasonable time for the defendant to appear. He was resident in Ireland: there is a semi-monthly mail communication from England to this Province. 90 days is allowed to elapse before the plaintiff makes an application to a Judge, and the Judge, upon an affidavit that a cause of action arose within this Province, makes an order for the plaintiff to proceed with the suit, enter his cause as of the term preceding, file his declaration *de bene esse,* and give the defendant time to plead from the 19th December to the first day of Hilary term next following. I am of the opinion the filing of the Judge's order, the declaration entered of Michaelmas term with a rule to plead endorsed thereon, were in compliance with the order, and that there was a proper entering. There was reasonable time for the defendant to ascertain what the proceedings were which the plaintiff was taking on the process served upon him. Those proceedings appear to be regular, and in accordance with the directions laid down in the Act.

The question then arises, whether the assessment of damages was made upon sufficient proof. The Act of Assembly says,

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"provided always that the plaintiff shall, and he is hereby required to prove the amount of the debt or damages claimed by him in such action, either before a jury upon a writ of enquiry, or before a Judge of the said Court, according to the nature of the case, as such Court or Judge may direct, and the making such proof shall be a condition precedent." This part of the Act takes it out of the ordinary mode of assessing damages in cases where a party has been served within the Province. This was not done in the present case; and the necessity of so doing is apparent. It must be remembered that this is an extraordinary jurisdiction given to the Court to issue process beyond the bounds of the Province, and therefore requires such proof as would be necessary to justify a Judge in charging a jury:—for instance, if upon a note of hand or bill of exchange, the hand-writing of the party would have to be proved. So, in an account, the sale and delivery of every article in the account, not a general statement, that the account hereto annexed is correct, but a particular reference to every item in the account and the liability of the defendant, and how it arose.

I am of opinion the judgment must be set aside, and the interlocutory judgment and subsequent proceedings should also be set aside upon the defendant entering an appearance.

ALLEN, J. I think the final judgment was clearly bad for want of sufficient proof of the debt. The principal question is as to the previous proceedings. I see no objection to the summons or service, but I think the entry of the cause was defective. The Judge's order, made on the 12th December, authorized the plaintiff to enter the cause, and a rule to plead as of Michaelmas Term. The cause had been entered on the 17th November, but the entry was a nullity, because, without the Judge's order, the plaintiff had no authority to proceed with the suit. There never having been any entry of the cause after the Judge's order, the subsequent proceedings were, I think, a nullity. I thought the proceedings regular down to and including Judge Weldon's order of the 12th December, because the plaintiff had a right to issue and cause the summons to be served on the defendant; but, having done that he had no right to proceed any further without a Judge's order. It is a statutory power, which must be followed, and is not governed

by the rule of practice in ordinary cases where the process is served within the jurisdiction of the Court. On this point I differ from by brothers FISHER and WETMORE in thinking that the plaintiff had a right to enter the cause after the return of the writ. The order of the Judge is a condition precedent to the plaintiff's right to go on with the cause, and any entry of the cause before such order obtained is a nullity. Then, if plaintiff cannot proceed without a Judge's order, has he followed it? Has he entered the cause in pursuance of that order? I think not. The Judge's order does not relate back and make the entry of the 17th November good. I consider the entry of the cause is an essential proceeding in a cause— without it, the subsequent proceedings are invalid: *Muldoon v. Beveridge.*[1] I should feel great difficulty in applying the strict rules with regard to waiver, in a case where the defendant was not served with process within the jurisdiction of the Court, nor was in any way subject to its jurisdiction, and had never done any act to give the Court jurisdiction by appearing, as in *Bayne v. Slack,*[2] though I admit that *Hutton v. Whitehouse*[3] is an authority against the defendant on this ground.

I think that both the interlocutory and final judgments should be set aside, and the defendant let into defend; that the plaintiff should be allowed to enter the cause *nunc pro tunc* under the Judge's order, and that there should be no costs on either side.

RITCHIE, C. J. It seems to me that the final judgment cannot stand, because the affidavit, in my opinion, is not sufficient to warrant the assessment. The statute requires the plaintiff (in these words) "to *prove* the amount of the debt or damages claimed by him in such action, either before a jury upon a writ of enquiry, or before a Judge of the said Court, according to the nature of the case, as such Court or Judge may direct, and the making such proof shall *be a condition precedent* to his obtaining judgment." This means, I take it, that the amount claimed must be established by legal proof. In the affidavit produced before the Judge I can discover no such proof. No evidence to warrant a Court or jury in saying, or from which a reasonable inference would be drawn

[1] 2 Kerr 532.
[2] 1 H. & N. 32.
[3] C. B. N. S. 363.

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that the amount for which judgment was entered was due from the defendant to the plaintiff. I think, therefore, there was a non-compliance by the plaintiff with the condition precedent, on the compliance with which alone he could obtain judgment. I likewise think the interlocutory judgment cannot stand, for want of a proper entry of the cause. All that a party plaintiff can do of his own mere motion in actions against parties residing out of the jurisdiction, under the 18 Vic. Cap. 25, is to issue the writ in the form provided by the Act, taking due care that, having regard to the distance from New Brunswick to the place where the defendant is residing, the time allowed for the defendant to appear is reasonable. After the issuing and serving of the writ, it is quite clear that no further proceedings are to be taken, unless such proceedings are directed by the Court or a Judge, and then liberty "to proceed in the action" can only be given to do so "in such manner and subject to such conditions, as to such Court or Judge may seem fit, having regard to the time allowed for the defendant to appear being reasonable, and to the other circumstances of the case." This provision was, no doubt, intended to keep the proceedings subject to the immediate supervision, control and direction of the Court or Judge, for the better protection of absent defendants. It would, therefore, seem to follow, as a necessary consequence, that the taking of any proceedings, beyond issuing and serving the writ, in the action, by the plaintiff or his attorney, without the direction or liberty of the Court, or a Judge, must be not only wholly unauthorized by law, but directly contrary to the spirit, intention and policy of the law, and, if so, null and void. If that is so, then it likewise follows that the entry, or attempting to enter the cause on the 17th November, 1870, was a wholly unauthorized act (which ought not to effect or bind the defendant, still less to be the basis of proceedings to render a judgment against him), and, therefore, simply a nullity. The attorney had no right to enter the cause at that time, and the clerk had no right to receive any such entry; and the simple fact of his receiving into the office, under such circumstances, a paper called an entry docket, and marking it filed, could not clothe the mere act of leaving such a paper at the office, which had no right to be left there, with any legal force or binding effect. I think the paper, having been thus

improperly received, must be treated as if it had not been received at all, or as so much waste paper. It was, in my opinion, of no more effect than as if the register of deeds should profess to record, and actually transcribe in the registry books a deed, or instrument without acknowledgment or proof. When, then, was this cause entered? The Judge did not profess to give an *ex post facto* operation to anything previously done, assuming he had power to do so, nor was he asked to do so. The Judge's order does not in any way, directly or indirectly, notice the attempted entry already referred to, but it directs an entry to be made, that is, I take it, a regular and proper entry under the authority there given. It neither declares that any paper already filed shall, *eo instante,* be deemed a good and sufficient entry, nor does it say that, when the declaration is filed, then the cause shall, by virtue of such filing and of the irregular and improper filing of the 17th November, 1870, be a good and sufficient entry. No reference whatever is made to the previous irregular proceeding, nor any attempt made or intention exhibited, that I can discover, to give it vitality, nor does even the fact of any such attempted entry appear to have been brought in any way to the Judge's notice. What he did order was simply that the cause should be entered and declaration filed. It is obviously based on the supposition that the writ has been issued and served, and nothing further done, and that the application was for the purpose of enabling further proceedings to be taken, and, therefore, clearly contemplates an actual entry of the cause after obtaining the order, and before which, the declaration should not have been filed. Can the cause be considered entered till such actual entry is made? The case of *Muldoon v. Beveridge*[1] clearly establishes that the cause is out of Court until duly entered and docket filed. CHIEF JUSTICE CHIPMAN says, "In this case, the original action not having been entered, and no docket of it filed, pursuant to the rules of this Court, it must be considered in the same light as a case where, under the general practice, the plaintiff omits to declare in due time, and the cause must be deemed out of Court. This case, and the rules of Easter term, 25 Geo. IV and that of Hilary term, 7 Wm. IV, were fully considered in *Miller v. Weldon,*[2] and the propositions of CHIEF

[1] 2 Kerr 532.

[2] 1 Hannay 376. See also *McCauley v. Geddes,* 4 All 591.

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JUSTICE CHIPMAN cited, adopted and acted on. The clerk has done no act since the order was made by Mr. Justice Weldon with a view to the entry of the cause. He was not applied to to receive or file anew, under the order, the paper previously left in the office, or to deal with it in any way so as to constitute it an entry under the order. Had the clerk been applied to by the defendant, after the order, and asked if the cause had been duly entered under the order, would he not have been compelled to reply in the negative? Or would it have been any answer to such an inquiry, or in any way have bound the defendant, if he had added, "but the plaintiff's attorney did file an entry docket on the 17th November, 1870?" Would not the simple and crushing answer to that be, "Yes, but I am not interested in, or affected by that?"

In other words, was the defendant bound to search anterior to the Judge's order? or, if he did, was he bound to notice, or act or an entry not *duly made,* or made when the plaintiff had no liberty to proceed in the cause?

On what day, then, can it now be said the cause was entered? Unless the entry of the 17th November can be referred to, there was no entry either in fact or in law. Mr. Palmer says the entry of the cause consisted in filing the declaration on the 19th December, and adopting the entry docket filed on the 17th November. But he had no authority to file the declaration till the cause was first entered. How, then, and by whose, and under what, authority and when, was the entry of the cause adopted? Was it by or under the authority of the Judge, the clerk or the attorney? The Judge did nothing but give liberty to the plaintiff to enter the cause, and the plaintiff clearly did not enter the cause in pursuance of such liberty. Instead of so entering the cause under the Judge's order, as he had liberty to do, he proceeded in the cause without any such entry and filed his declaration, either overlooking that part of the Judge's order which required the cause to be entered, or assuming that, by some process or other, an unauthorized act previously done, and which, when done, was not only irregular, but wholly without effect at the time it was done, had, by some process, become regular and effective, and equivalent to a regular entry under the Judge's order. Until the cause was regularly and properly entered, the defendant was not bound to

appear, and the clerk should not have signed either interlocutory or final judgment, because, by rule of Easter term 11 Vic., judicially affirmed in *McAuley v. Geddes* and *Miller v. Weldon,* "no judgment, interlocutory or final, is to be signed in any cause until it is ascertained upon search that the cause has been *duly entered.*"

The result will be that, on the defendant forthwith filing common bail, the interlocutory and final judgments will be set aside; and, as both the parties are by this course found in fault, we shall say nothing as to costs.

Judgment accordingly.

CASES DETERMINED

BY THE

SUPREME COURT OF NEW BRUNSWICK

IN

EASTER TERM, XXXV VICTORIA

THE COMMERCIAL BANK OF NEW BRUNSWICK *v.* PRICE

1872.
April

County Court—Practice—Judge making ex parte order for new trial.

In an action in the County Court, the jury having found a verdict for the defendant, contrary to the Judge's direction, he made an *ex parte* order for a new trial. On appeal, the order was reversed, and the case sent back to the County Court, with direction to issue an order calling on the defendant to shew cause why a new trial should not be granted.

Appeal from the Saint John County Court.

Feb. 15. *A. L. Palmer, Q. C.,* and *C. W. Weldon* supported the appeal.

S. R. Thomson, Q. C., contra.

Palmer, Q. C., in reply.

The facts of the case sufficiently appear in the judgment.

Cur Adv. Vult.

The judgment of the Court (ALLEN, WELDON, FISHER and WETMORE, JJ.) was now delivered by

ALLEN, J. In this case a verdict was found for the defendant in the County Court of St. John, contrary to the charge of the Judge. The plaintiffs applied for a new trial, which the Judge

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granted without hearing the defendant, and from this decision the defendant has appealed.

The power to grant new trials in the County Courts is regulated by the 22nd Sect. of the Act, 30 Vict. c. 10, which enacts, that "the several Courts, or the respective Judges thereof, shall have power by rule or order, in term or vacation, to set aside verdicts or non-suits, and grant new trials. and make orders for judgments *non obstante veredicto,* or for arresting judgments, and may by rule or order, set aside judgment by default, set aside proceedings for irregularity, grant time for pleading, and order stay of proceedings till security be given for costs, and may issue summonses and make orders in all matter of practice, in like manner, and on like grounds, and to the same extent as in the Supreme Court, or by the Judges thereof."

We think the words "in like manner," in the latter part of the section, overrule the whole of the preceding part, and that all the powers given to the County Court Judges in the several matters therein referred to, should be regulated by the practice of the Supreme Court. If that is so, such a verdict as was given in this case would necessarily have been set aside, in this Court, as being contrary to the Judge's direction, without any examination into the merits of the case: See *Allison v. Robinson* decided in this Court in Michaelmas Term last.

But in the Court, that would only have been done after a rule *nisi* granted, and served upon the party who obtained the verdict; and we think the same practice ought to be adopted in the County Courts, and that an *ex parte* order to set aside a verdict is irregular.

It may be that this result would have been the same, if the defendant had been heard on the application for the new trial; but we think it would be a dangerous practice, and contrary to the principles of justice, to allow the rights of parties to be determined without giving them an opportunity of being heard.

We think the judgment of the County Court should be reversed, and the case sent back to the Judge with a direction to grant a summons or order *nisi* calling on the defendant to shew cause why the verdict given for him should not be set aside, and a new trial granted.

RITCHIE, C. J. I did not hear the argument, but, having heard the judgment, I entirely coincide in it. It would be a most dangerous practice to decide cases without both parties being heard.

Judgment of the County Court reversed.

SIMPSON *v.* GLASS *et al.*

1872.
April

County Court—Jurisdiction—Offset—Recalling evidence.

Where the plaintiff proved goods sold and delivered to the defendants, beyond the amount recoverable in the County Court, and also admitted the receipt of goods from, and work done by, the defendant, which if deducted from the plaintiff's account, would have brought the amount within its jurisdiction; but omitted to prove any agreement that such goods and work were to be taken as payment, whereupon the defendants moved for a nonsuit.—

Held, That it was discretionary with the Judge to allow the plaintiff to be recalled to prove that there was such an agreement.

Appeal from the Queen's County Court. The action was assumpsit for a balance of account for goods sold and delivered. A verdict being entered for the plaintiff for $198, a motion for a new trial was made on behalf of the defendants before the Judge, and refused, from which decision the present appeal was made, the grounds of which are stated in the judgment.

Feb. 19. *Needham* for the appellants.

E. L. Wetmore, for the respondent.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

ALLEN, J. This was an appeal from the County Court of Queen's County . The grounds of appeal, were 1st. That the case proved by the plaintiff was beyond the jurisdiction of the County Court; and 2nd. That there was no evidence of a joint liability in the defendants.

We think there was sufficient evidence to leave to the jury, that the goods, for the price of which the action was brought, were supplied on the credit of both the defendants; and the jury having found that fact in favor of the plaintiff, we should not be warranted in disturbing the verdict on that ground.

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On the other point, it was contended that the plaintiff having closed his case without proving that the goods delivered and work done by the defendants, were agreed to be taken as a payment on the plaintiff's account, the amount was beyond the jurisdiction of the County Court, and that the Judge had no right to allow the plaintiff to be recalled to prove the payment. We think, however, that it was a matter in the discretion of the Judge to allow the evidence to be given at the time he did. That being so, the plaintiff proved payments by the defendants to the amount of $129—as we make it—which deducted from the amount of the plaintiff's account proved, would leave a balance of $179 in his favor—to which sum we think the verdict should be reduced.

The appeal must be dismissed, but under the circumstances, without costs, and the case will be remitted to the County Court to reduce the verdict to the sum of $179.

Appeal dismissed without costs.

THE MAYOR &c. ST. JOHN *v.* BROWN *et al.*

1872.
April

Practice in Equity—Injunction—Application ex parte—Necessity for party applying to state all important facts.

Where a party applies for an *ex parte* injunction, he is bound to state all the facts which are important to be brought before the Court, and and which might influence it in determining upon the application; and if important facts, within the knowledge of the party, are omitted, the injunction will be dissolved without regard to the merits. In this case, where an injunction was granted to restrain the defendants from building a wharf beyond the line of high-water in the harbor of St. John, the plaintiffs claiming by their charter the soil of the harbour and the space between high and low water mark; but the defendant held under a prior grant from the Crown, extending to low water mark, and claimed the right to extend his wharf as the owner of the land, which facts were known to the plaintiffs, but were omitted from their bill—the injunction was dissolved on this ground alone.

Appeal from the judgment of WELDON, J., sitting in Equity, dissolving an order of injunction granted on April 11, 1871.

Feb. 19, 20, and 21, 1872. *Duff, Q. C.,* and *B. L. Peters, Q. C.* supported the appeal.

S. R. Thomson, Q. C., A. L. Palmer, Q C., and *C. W. Weldon,* contra.

Feb. 22 and 23. *Duff, Q. C.,* in reply.

The facts in the case are sufficiently stated in the judgment.

Cur. Adv. Vult.

The judgment of the Court (ALLEN, WELDON and FISHER, J. J.) was now delivered by

ALLEN, J. An *ex parte* injunction was granted in this case on the 11th April last, to restrain the defendants from placing or sinking a wharf or pier in the harbour of St. John, at the western end of a wharf occupied by the defendant Brown on the south side of Union Street Slip; and from extending the said wharf to the westward, or in any way obstructing the navigation of the harbour.

The plaintiff's bill stated that by letters patent under the great seal of the Province, dated the 18th May, 1785, His Majesty, King George the III, granted to the plaintiffs (*inter alia*) that certain district on the east and west side of the river St. John, at the entrance thereof, and all the lands and waters thereto adjoining, commencing near Fort Howe at Portland Point, at low water mark, etc., (describing certain bounds, which included the harbour of St. John) and every part thereof, as well the land as the water, and the land covered with water, within those limits, should be a city incorporate, by the name of "The City of St. John." That by the said letters patent his said Majesty also granted to the plaintiffs (among other things) all and singular the messuages, tenements, houses, lots of ground and other lands or ground whatsoever covered or uncovered with water, situate and being within the said City of St. John, and the limits and boundaries thereof, together with all the streams of water, land covered with water, bays, inlets, harbours, fishing and all other profits, privileges and advantages, hereditaments and appurtenances whatsoever to the said lands and premises within the limits and boundaries of the said City, belonging or in anywise appertaining, (saving and reserving to the inhabitants of the said City, and others, their heirs and

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assigns, all such houses, lands, etc., as he, she or they then had, held, or enjoyed, or which he, she or they might or could legally claim, by or under any grant or patent under the great seal of the Province of Nova Scotia, or of New Brunswick.) *Habendum,* all and singular the said premises, unto the said plaintiffs and their successors forever. That his said Majesty did also, by the said letters patent, give and grant to the plaintiffs, that they and their successors should be the conservators of the water of the river, harbour and bay of the said City; and should have the sole power of amending and improving the said river, harbour and bay, for the more convenient, safe and easy navigating, anchoring, riding and fastening the shipping resorting to the said City, and for the better regulating and ordering the same; and that the plaintiffs should and might, as they thought proper, erect and build such and so many piers and wharves into the said river, as well for the better securing the said harbour, and for the lading and unlading of goods, as for the making docks and slips for the purpose aforesaid; and that the plaintiffs should and might receive and take reasonable anchorage, wharfage and dockage for the same. That the defendant, Brown, claimed to be, and the plaintiffs believed he was, in possession of a certain wharf on the south side of Union Street Slip, on the eastern side of the harbour of St. John, and in or about the month of August, 1870, he applied to the plaintiffs for the privilege and right to extend and construct a pier or wharf westwardly, from his then possession, into the harbour, over a portion of the land covered with water. granted to the plaintiffs by the said letters patent. That, it having been made to appear to the satisfaction of the plaintiffs that the construction and extension of such pier or wharf into the said harbour at that place, would be an obstruction to the navigation of that part of the harbour, and a great injury to the owners of other wharves and property in that vicinity, they refused to grant him the privilege which he applied for. That since such refusal, the defendants Clark & Stackhouse had constructed for Brown, a frame-work or pier of logs and timber, to be sunk in the harbour at the western end of Brown's wharf; and on the 7th April last had caused it to be floated there, and were proceeding to sink it with stone and ballast, so as to constitute a stationary wharf or

pier there, in extension of the defendant, Brown's wharf. That the plaintiffs immediately forbade the defendants from sinking the pier, but they persisted in the determination to do so, without regard to the rights of the plaintiffs, either as owners of the soil, or conservators of the harbour; and that the plaintiffs, in order to conserve and protect the harbour and the navigation, and to prevent the pier from being sunk there, had removed it, and had since occupied the water of the harbour to the westward of Brown's wharf, where the defendant had intended to sink the pier, by keeping men and boats there.

The statements in the bill were verified by affidavits; to one of which, a plan was annexed, for the purpose of shewing the proposed extension of the defendant's wharf, and the relative position of several other wharves and slips.

The defendant, Brown, having put in an answer, moved to dissolve the injunction on several grounds: 1st. That he was owner of the fee at low-water mark, under a grant from the Crown made before the Charter of St. John, and therefore had a right to extend his wharf to that line. 2nd. That, as owner of the land, he had a right to extend his wharf out to the harbour line, as established by the Act 27, Vict. c. 18. 3rd. That if the proposed extension was an interference with the public right of navigation, the suit should have been brought in the name of the Attorney General. 4th. That the plaintiffs, knowing the grounds upon which Brown claimed the right to extend his wharf, had omitted to state material facts in the bill, and had misrepresented other facts within their own knowledge.

The answer of the defendant Brown, which was used as an affidavit, stated that on the 9th August, 1784, a grant was made by the Crown of the principal part of the land in the City of St. John (then called Parrtown) to a number of persons in severalty; and among others, lot No. 1, extending to low-water mark, was granted to Thomas Leonard. After several mesne conveyances, this lot was conveyed to the defendant Brown, in February, 1870. No conveyance was shewn from Thomas Leonard, the grantee; but the transfers were regular from the year 1817, and Brown's title to lot No. 1 cannot very well be questioned.

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A wharf had been built upon this lot, between high and low water mark, in 1818, many years before Brown came into possession.

In August, 1870, Brown applied to the Common Council for permission to extend his wharf to the harbour line, so as to bring the front of it in a line with the adjoining wharves on the south side; but he stated that he did so in ignorance of his right. That, not receiving any answer to his application, he took a legal opinion, and was advised that, under his title, and under the Act of Assembly relating to the harbour of St. John, he had a right to extend his wharf to low-water mark; and that immediately afterwards, on the 15th November, he informed the Mayor that he wished to withdraw his application for permission to extend his wharf, as he found that he himself had the right to extend it to low-water mark, and intended to do so. That he learned nothing further from the Common Council, but saw in a newspaper on the 17th November, that, at a meeting of the Council on the previous day, his application for permission to extend his wharf had not been complied with. His answer also stated, that, after notifying the Mayor of his intention to extend his wharf, he had contracted with the defendants, Clark and Stackhouse, to build it, and had directed them to apply to Mr. Peters, the City Engineer, to ascertain the distance between his wharf, and the harbor line, in order that they might know the size of the frame they were to build. He admitted that this frame had been floated to the western end of his wharf, with the intention of sinking it there, when he was prevented by the plaintiffs, as alleged in the bill.

The defendants Clark & Stackhouse stated in their answer, that, before commencing to build the wharf, they had told Mr. Peters, the City Engineer, what they intended to do, and got from him the distance from the western end of Brown's wharf to the harbour-line, as defined by the Act, and that they built the frame work of the wharf two feet shorter than the measurement so given them, in order to be sure that the extension of the wharf would be within the harbour line.

In opposing the motion to dissolve the injunction, the plaintiffs' counsel produced affidavits denying some of the statements in the defendants' answer, and also set up a case quite different from

that stated in their bill. The affidavit of Mr. Peters, the City Engineer, (produced by the plaintiffs) stated that he had no recollection of giving to Clark & Stackhouse the measurement they alleged, and had no knowledge, or belief, that Brown intended to extend his wharf without the permission of the Common Council. The Mayor's affidavit admitted, that at the time Brown told him he wished to withdraw his application for leave to extend his wharf, he also stated, he had found his title deeds gave him the right to extend it without the leave of the Corporation; but he (the Mayor) denied all knowledge of the construction of the frame-work of the wharf, till he heard of its being afloat in the harbour, on the day the defendants were preparing to sink it. There were other affidavits stating that a portion of the wharf, now in possession of the defendant Brown, was built in the year 1818; that at that time the water at the end of it, was 10 or 12 feet deep at low tide; that since that time, the line of low-water mark had receded very considerably, from the accumulation of sediment or other causes; that in 1855, an extension of 100 feet in length was built on the western end of the original wharf, at which time, the line of low-water was about the northwest corner of the old wharf; and when it was extended, the water was between 5 and 6 feet at the Northwest corner, and 7 or 8 feet deep at the southwest corner of the present wharf, at low-water. That on the 28th July last (when there was a medium tide), a measurement was made of the depth of the water at the end of Brown's wharf when the tide had reached its lowest point, and the water was then 18 inches deep at the southwest corner of the wharf, and extended along the west part of it to within about 8 feet of the northwest corner; and that the water was 5 feet deep at the point to which it was proposed to extend the wharf. There were affidavits in reply, but nothing turns upon them.

It is quite clear that, unless the plaintiffs can sustain the injunction on the facts stated in the bill they cannot do so on any other ground, for they must distinctly state the ground on which they put their case, and have no right to set up a new case: *Cresey v. Beavan;*[1] *Stedman v. Webb;*[2] *Barker v. North Staffordshire Railway Co.*[3]

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[1] 13 Sim. 99.
[2] 4 My & C. 351.
[3] 2 DeG. & S. 55, 12 Jur. 598.

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If the plaintiffs intended to rely upon the fact that the pres wharf extended to low-water mark, and therefore that Brown no right to build any further out into the harbour, they have alleged any such case in their bill. So, if they intended to upon either of the other grounds taken on the argument, viz that Brown's title must be confined to the line of low-water a existed at the time the charter of the City was granted; or th admitting Brown to be the owner of the soil where the wharf intended to be built, still he had no right to build it without consent of the plaintiffs, as conservators of the harbour, under charter, we think they should have framed their bill in such way as to support those claims, and to inform the defendant the case they intended to set up.

It might, perhaps, be possible, by ingenuity of argument t spell out of the allegations in the bill, some facts to sustain th case which the plaintiffs now set up; but it cannot be done by any fair and reasonable construction of the language of the bill; and no one reading it, would suppose that the plaintiffs intended to rely on such a case as they did, in opposing the motion to dissolve the injunction. It was their duty to state fully and fairly all the material facts within their knowledge, and not to conceal or misrepresent anything. Unless this is done, an injunction, obtained *ex parte,* will be dissolved on this ground alone, though the plaintiff may really have merits: *Attorney General v. Mayor of Liverpool;*[1] *Hilton v. Lord Granville;*[2] *Hemphill v. McKenna;*[3] *Castelli v. Cook;*[4] *Brown v. Newall;*[5] *Fitch v. Rochfort;*[6] *Dalglish v. Jarvie.*[7]

In *Castelli v. Cook,* WIGRAM, V. C., says; "The rule as to *ex parte* applications is this—that parties making them are considered as coming under a species of contract with the Court, to state the whole case fully and fairly. If they fail to do that, then, when the other parties apply to dissolve the injunction, and shew that something has been improperly suppressed, the Court refuses to try the case upon the merits, upon the ground that the applicant has broken faith with the Court, and then the injunction is dissolved." And in *Dalglish v. Jarvie,* ROLFE, B. says, that

[1] 1 My. & C. 210.
[2] 4 Beav. 131.
[3] 3 Dru. & W. 183.
[4] 7 Hare 89. 13 Jur. 675.
[5] 2 My. & C. 571.
[6] 18 Law J. Ch. 458.
[7] 2 Mac. & G. 238.

applications for *exparte* injunctions are governed very much by the same principles as insurances, where the party applying to insure is bound to use the utmost good faith, and to state, not only all matters within his knowledge which he believes to be material, but all such as, in point of fact, are so, and might influence the party about to insure; and that, if a party applying for an injunction, abstains from stating facts which the Court thinks are material to enable it to form its judgment, he disentitles himself to the relief which he asks.

Now, though it cannot be said whether the injunction would, or would not have been granted if the facts had been truly set out in the bill, it is impossible to deny that the statement of these facts would have presented the defendant's case in a very different light from what it appeared by the bill; and, therefore, might, and probably would, have had a material influence on the Judge in deciding on that application.

Without saying that there was any intention of concealment, we think it was clearly the duty of the plaintiffs to state in the bill how Brown held the property, and why, and by what authority, he claimed the right to extend his wharf. All these facts must have been within the plaintiffs' knowledge; and yet there is not a word in the bill about the grant to Leonard and others (which certainly has an important bearing on the case), and the claim of Brown under it; or of the Act of Assembly relating to the harbor-line, which appears to have been passed on the plaintiffs' application, and the plan of which was filed with their clerk; and, though Brown's application to the Common Council to extend his wharf is stated, a very material fact in connection with that transaction—namely, that he asked the Mayor's permission to withdraw that application, stating as a reason, that he had discovered that his title to the property gave him the right to extend his wharf, without any permission from the Council—is altogether omitted. We do not mean to say, that a verbal application to the Mayor was the proper mode of asking to withdraw a written application sent to the Common Council, but, as the Mayor admits the application was made, and knowledge of it by the plaintiffs is not denied, we cannot doubt that the Common Council was aware of it, particularly as Brown's application for leave to extend his wharf was refused at

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a meeting on the following day, at which meeting, the Mayor, a the head of the Corporation, ordinarily presides.

How could the defendants possibly know from the statements i the bill, that the case the plaintiffs intended to set up was that th wharf was already built out to low-water mark, and, therefor Brown had no right to extend it; or, that the line of low-water e the date of the charter was Brown's boundary, and that th accretion belonged to the plaintiffs; or that, admitting the soil t belong to Brown, to the present line of low-water, the exclusiv right to build wharves in the harbour was vested in the plaintif by the charter of the City.

We regret that a case involving such very important right should be determined upon points which do not decide the re question in dispute; but the practice with respect to *ex par* injunctions is so well established, that we think it impossibl consistently with that practice, that this injunction can stand.] is also much to be regretted that Mr. Brown's offer to Mr. Peter that if the plaintiff would agree to apply for an injunction t restrain him from extending the whraf, he would desist from sinl ing it till the right was determined (see the 11th paragraph of h answer), was not communicated to, and accepted by the plaintiff instead of removing the structure by force, and thereby increasin the bad feeling, and complicating the difficulties.

It is unnecessary, at present, to decide the question of makir the Attorney General a party. That will be a matter for tl plaintiffs' consideration if they proceed with this suit, relying up the fact that the proposed extension of the wharf will be a interference with public rights. This appeal must be dismiss with costs.

Appeal dismissed with cost

DEVER *v.* THE SOUTH BAY BOOM COMPANY.

1872.
April

Negligence—Boom breaking—Obligation—Trespass.

By Act 10 Vic. c. 72, amended by 11 Vic. c. 49, and 17 Vic. c. 52, the South Bay Boom Company was authorized to erect piers and a boom between certain points on the River St. John, for the purpose of securing timber and lumber, and was authorized to charge boomage on all timber and lumber brought within the boom or fastened to the outside thereof.

Held, that though the Company had the general control and direction of all lumber within the boom, it was under the immediate charge of the owners thereof; and therefore the Company was not liable to a proprietor of land within the limits of the boom, for damage done by lumber in the boom breaking adrift, and floating upon his land—there being no duty imposed upon the Company, by the Acts, to prevent lumber deposited in the boom from drifting on the adjoining shore; and no evidence of negligence on the part of the Company, or of their omitting to use all proper precautions in the erection of their piers and booms.

Held also, that the Company is not liable in trespass where rafts are fastened to trees on the shore of land within the limits of the boom, unless the act was done by the Company or their servants, or with their knowledge and consent; or, if done by other persons,—unless the Company has adopted the Act. The mere fact that the Company is entitled to boomage on all lumber coming within the boom does not raise any presumption that the lumber was fastened in a particular place by their direction; nor is the receipt of boomage an adoption of the act of the owners of lumber in fastening it to the land of a riparian proprietor.

This was an action of trespass and case. The declaration was as follows: 1st count. For that the said defendants on the first day of May, in the year of our Lord one thousand eight hundred and seventy, and on divers other days and times between that day and the day of exhibiting this bill with force and arms, &c., broke and entered a certain close of the said plaintiff, situate and being in the parish of Lancaster, in the city and county of Saint John, known and described as all that certain piece or parcel of land, situate, lying and being in the parish aforesaid, on the northerly side of the road leading to the Indiantown ferry, and fronting on the South Bay, commencing on the line dividing the property from the property of the Corporation, occupied by one Timothy Murphy, where it is intersected by the northerly side line of the said road; thence running northerly on the said dividing line to the South Bay, thence westerly along the Bay shore sixty-six and two-thirds rods, at right angles, and to the line dividing the said close or property from the Bogg's farm, and thence south along the said last mentioned dividing line to the north-side-line sixty-six and two-thirds rods to the place of beginning, and then and there put and placed in and upon the said close divers, to wit, one hundred

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sticks of pine timber, one hundred sticks of birch timber, one hundred sticks of other timber, one hundred pine logs, one hundred spruce logs, and one hundred other logs, and thereby spoiled and destroyed the grass of the said plaintiff, of great value to wit, of the value of one hundred dollars, and also, then and there kept and continued the said timber and logs in and upon the said close without the leave, or license, and against the will of the said plaintiff, for a long space of time, to wit, from the said first day of May, in the year aforesaid, hitherto, and thereby, and therewith during all the time aforesaid, greatly incumbered the said close, and hindered and prevented the said plaintiff from having the use, benefit and enjoyment thereof in so large and ample a manner as he might and otherwise would have done, to wit, at the parish aforesaid, in the City and County aforesaid, and other wrongs to the said plaintiff, then and there did against the peace of our said Lady the Queen, in and at the parish aforesaid, in the city and county aforesaid. 2nd count, And whereas, also, before and at the time of the committing of the grievances hereinafter mentioned the said defendants were and are a body corporate, fuly incorporated by an Act of the General Assembly of this Province, intituled an "Act to incorporate the South Bay Boom Company," for the purpose of placing, erecting, and maintaining piers and booms, and any other works on the shore connected therewith, in that part of the River Saint John, which is between the point formerly owned by Shubal Stevens, and known as the Elm Tree Point at the head of the South Bay and Mosquito Head (so called), *for the safe and convenient depositing and securing of timber, logs, masts, spars and other lumber,* and whereas, the said plaintiff heretofore, to wit, on the first day of May, in the year aforesaid, and thence hitherto hath been, and still is, lawfully possessed of, and in the occupation of a certain close, situated in the parish of Lancaster, in the city and county of Saint John, having a frontage or shore on the south side of the South Bay, of the river Saint John, sixty-six and two-thirds rods wide or thereabouts, within the limits or bounds above described, and used and enjoyed the same as a farm for tillage, pasturage and other farming purposes. And, whereas, the said defendants have placed, erected, maintained, and still maintain piers and booms between the limits aforesaid, and in pursuance of the powers vested in them by the said Act of Assembly,

use, occupy and employ the waters within the said limits, and including the waters in front of the said land, for depositing and securing of timber, logs, masts, spars and other lumber. And the said plaintiff being such owner of said shore or frontage as aforesaid, it became, and was then and there, the duty of the said defendants so to deposit and secure the timber, logs, masts, spars and other lumber, put within or entering the said piers and booms so as the said timber, logs, masts, spars or other lumber should not be floated, carried, driven up and deposited into or upon the said shore or lands of the said plaintiff. Yet the said plaintiff in fact saith, that the said defendants not regarding their said duty in this behalf, and well knowing the premises, but contriving and wrongfully and unjustly intending to injure and aggrieve the said plaintiff in that behalf, and whilst the said plaintiff was so possessed as aforesaid, and to deprive him of the use, benefit and advantage of his said close, shore or frontage, so carelessly and negligently deposited and secured the said timber, logs, masts, spars or other lumber put within and entering their said piers and booms within the limits aforesaid or a large portion thereof, so that by reason thereof, and of the same not being safely deposited and secured, divers large quantities of the said timber, logs, masts, spars and other timber, to wit: one hundred sticks of timber, one hundred logs, one hundred masts, and one hundred sticks of other lumber were floated, carried, driven up and deposited in and upon the said close and lands of the said plaintiff, whereby, and by means whereof, the said plaintiff's grass, then and there growing, of great value to wit, of the value of one hundred dollars of lawful money, of the said Province, was damaged, spoiled, and destroyed, and thereby the said plaintiff has been, and still is, deprived of the use, enjoyment and profit of his said lands, shore or frontage in as large, extensive and beneficial a manner as he ought to have done and otherwise might and would have done, to wit: at the parish aforesaid, in the city and county aforesaid, to damage of said plaintiff of five hundred dollars, and therefore he brings his suit, &c.

The cause was tried at the St. John Circuit in May, 1871, when a verdict was entered for the plaintiff for $20 on the first count,

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and $60 on the second count. Leave being reserved to enter a non-suit, in Trinity term following—

Duff, Q. C., obtained a rule *nisi* for a new trial or nonsuit. Points for nonsuit: 1st. No evidence of any trespass committed by the defendants. 2nd. No duty imposed upon the defendants to keep lumber which may be deposited in their boom, or to remove it from the shore, should it be carried there by the freshet. 3rd. No evidence of negligence to support the second count.

Points taken for new trial: Misdirection, 1st. In telling the jury, that, if the defendants had received boomage on logs in their booms, they adopted the act of the owners of the logs and were trespassers, and answerable for the trespasses committed by the owners of the logs. 2nd. In telling the jury that, if the defendants allowed lumber in their boom to go adrift, any person on whose land the same was carried by water could recover damages.

Oct. 23. *C. W. Weldon* shewed cause, citing *Coe v. Wyse;*[1] *Parnaby v. Lancaster Canal Co;*[2] *Green v. Corporation of St. John;*[3] *Bagnall v. London and North Western Railway Co.;*[4] *Lawrence v. Great Northern Railway Co.;*[5] *Cracknell v. Thetford (Mayor, &c.)*[6]

Duff, Q. C., was heard in support of the rule.

Cur Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C. J. As to the first count, the alleged trespass was in fastening rafts and timber, deposited in the defendants' piers and booms, to the plaintiff's shore and tying them to his trees standing thereon. The learned Judge left the question to the jury; and it is now contended that there was no evidence of any trespass committed by the defendants, and therefore nothing to leave to the jury on this count. It is also contended that the learned Judge was wrong in telling the jury that, if the defendants had received boomage on the logs so fastened, they adopted the acts of the owners of the logs and were trespassers; and that, if the learned Judge was right in this, there was no evidence that boomage was

[1] L. R. 1. Q. B. 711.
[2] 11 A. & E. 223.
[3] 1 Han. 531.
[4] 7 H. & N. 423.
[5] 16 Q. B. 643.
[6] L. R., 4 C. P. 629.

paid on the logs that did the injury, and, therefore, no evidence of the defendants being trespassers.

As to the second count, it was argued that there was no duty imposed on the defendants to keep lumber deposited in their booms from drifting on to the shore, or to remove it from the shore, should it be carried there by freshet; that there was no evidence of negligence to support the second count, and that the learned Judge was wrong in telling the jury that, if the defendants allowed lumber within their booms to go adrift, any individual on whose lands it drifted could maintain an action. The 10 Vic., Cap. 72, after reciting that, in consequence of the great losses and damages that have at different times happened from the want of proper places near the mouth of the river St. John in which to receive timber, logs, masts, spars and other lumber brought to the Saint John market, it is deemed expedient to erect and maintain piers and booms in the said river Saint John, in that part thereof, which is between the point at the head of South Bay, formerly owned by Shubal Stevens, and known as the Elm Tree Point and Mosquito Head (so called,) for the purpose of preventing a recurrence of such losses and damage. It then recited, that it is deemed expedient to incorporate a company for that purpose, and Section 1st then proceeded to incorporate the South Bay Boom Company.

The Preamble of the Act shews that great public benefit was contemplated as the result of the operations of the company in preserving the great staple of the country; and, to insure its accomplishment, the Act gives full power and authority to the Corporation to place, erect and maintain piers, booms and other works in the River St. John, and thereby to inclose South Bay for the safe and convenient depositing and securing of timber &c., and permits them to enter into and upon and occupy, for this purpose, all and any of the waters of the River St. John within the limits therein specified—leaving free access for boats and scows to the shore within the said limits, unless where the Corporation may enter into a special agreement with the owners of the shores for compensation for damages sustained by reason of the occupation thereof by the Corporation. This Act thus permitted an interference with, and exclusive use of, the navigable waters of the River Saint John, which would otherwise have been illegal, thereby also

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making in the River, as it were, a harbor or place of refuge and safety for timber being brought to the St. John market, and to which any person or persons owning or having charge of timber &c., might resort on payment of certain tolls or boomage.

We think the fair construction of this Act is that the timber &c. placed within the booms, or fastened to, or secured by, the piers or booms on the outside is to be under the general control and direction of the Corporation, by the superintendent and officers for the general regulation of the boom, maintaining order among the different depositors and securing boomage and preserving free ingress and egress to and from the boom, and securing free access for boats or scows to the shore within its limits. But, as subordinate to this, we think the timber &c., is to be under the immediate charge of the owners respectively—fastened and secured by their own tackle and rigging and at their own charge and expense, and that the property is to be at their own risk—the boom being in the nature of a harbor, and the company acting in a capacity analogous to that of a Harbor Master. This is, we think, to be very clearly gathered from the Act of incorporation, and the Acts in amendment thereof. By section 13 of the first it is enacted, that the Corporation shall not be liable for the loss of any timber &c., which may pass out of, or by the said piers or booms, or escape therefrom, unless such loss is occasioned through their illegal neglect or default, or the wilful neglect or default of their agents or servants. And by section 16 it is declared that, "All persons having, or taking charge of timber or other lumber, when the same shall be put within, or enter within the piers and booms, or be fastened thereto, shall, in addition to the owner or owners thereof, be liable to pay the boomage thereon; and surveyors of lumber within the booms, or fastened thereto, are required to render an exact account of the same, with marks and owners' names, to the Superintendent within ten days of the survey, and, in default, the Corporation may take account at the expense of the owner."

So by the 6th Section of the 11 Vic., c, 49, passed in amendment of the Act of incorporation, it is enacted that, if any person or persons whomsoever (*except the owner or owners, or person or persons lawfully in charge of any rafts of timber, logs, masts, spars,*

or other lumber placed within said booms or attached thereto, or otherwise lawfully authorized) shall cut, remove, displace, or otherwise intermeddle or interfere with any warp which fastens any such raft of logs, masts &c., or shall, not being duly authorized, remove or otherwise interfere or intermeddle with any timber &c. placed within or attached to such Boom, the party offending shall forfeit &c. And by Section 7, should any timber &c. be placed within the boom or, made fast to the boom &c., be so placed as to prevent or hinder or otherwise obstruct access to the boom or the taking or removing from the said boom of any timber &c., it shall be the duty of the Superintendent *"to notify such owner or owners, person or persons having charge of timber, &c. so to place the same as not to prevent,* hinder or otherwise obstruct the taking into, or removing from said boom such timber &c.; and if such owner or owners, or person, or persons *having charge of timber &c.,* shall refuse for the space of three days to remove or place such timber &c. so as not to prevent, hinder, or otherwise obstruct the access into or out of the boom, or the taking or removing from the boom any such timber &c., then the Corporation may by their Superintendent &c. remove or place such timber, so hindering, in such position as will secure full and free ingress and egress to and from said boom, replacing or otherwise securing such timber as fully and effectually as the same was before its removal. The section thus provides for the Corporation charging expenses incurred to the person or persons liable for boomage with the same lien and powers of collection as are provided for securing the payment of boomage. And the 17 Vic. c. 52, likewise passed in amendment, after reciting that the formation of the Company and their operations under the charter had so far been successful in carrying out the object contemplated thereby, but that the then arrangements had been found inadequate to meet the existing necessity for greater security for timber *after being placed within the booms,* and that the owners of timber had urged on the Company the necessity of enlarging its operations, by erecting and placing more piers and booms, with a view to the prevention of rafts &c. within the main boom from being broken up and scattered, or otherwise interfered with, by gales or winds or other causes, and after reciting insufficiency of their capital and inadequacy of the rates to meet the increased

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expenditure, proceeds to provide therefor; and section 2, after reciting that owners of rafts, &c. or those in the charge of, or having the control thereof *frequently leave the same within the booms in positions dangerous to the property of others within such booms, without sufficiently securing the same, and often without leaving sufficient rigging or other means for properly securing the same, whereby the said boom, and the property within the same become* greatly endangered, and large expenses have occurred thereby and therefrom, gives power to the Corporation or their Superintendent to *direct* in what position and situation all rafts &c. brought within the boom shall be placed, and how the same shall be *secured,* and, in the event of the *owners or persons in power or charge or apparently in possession and charge refusing or neglecting forthwith to obey such directions,* the Corporation, &c. may employ men and furnish rigging necessary for placing the rafts &c. in the position or situation deemed right and proper by the Company &c., and for safely fastening and securing the same so that the same may be kept safe and secure, and prevented from injuring or interfering with the boom or any property therein, and all expenses &c. shall be borne and paid by the owners, *the persons in charge* being also made liable.

The like lien as for boomage is given, and section 5 enacts, "that any person, save the Manager or agent of the Company, removing any timber within said booms *without the consent of the owner thereof,* or loosing the fasts thereof or of any rafts within the said booms, without permission of the Manager or agent aforesaid first obtained thereto, or not properly fastening the same again to the satisfaction of said Manager or agent, shall be liable to a penalty of £50, &c.

Construing this Act of Incorporation in the strongest way against the Company, as a bargain between a Company of adventurers and the public, where any ambiguity in the terms of the contract must operate against the adventurers and in favor of the public, that is, looking on the Corporation as a trading company, acting for their own private advantage, and, therefore, personally responsible if mischief ensues, from their not doing all they ought, or doing in an inferior manner what they are called on to do,—construing the Acts strictly against these parties, and liberally in favor of the public, notwithstanding the public advantage being

given in return for the privilege conferred by the Legislature, and making the language of the Act as the language of the promoters, rather than considering their object an undertaking of a public nature, in which the Company are acting partly for the public and partly for their own benefit, we cannot bring our minds to the conclusion that there is any arbitrary, unqualified duty on the Corporation to keep the timber which may be deposited in their booms from drifting on the shores within the booms, or to remove it from the shores, should it be carried there by the freshet. The statute imposes, in terms, no such obligation, and we can discover no facts in this case that raise this duty. The Legislature has expressly and unqualifiedly authorized the erection of piers and booms by the Corporation in a portion of the River St. John; and has, in like manner, permitted the waters of the river enclosed by such piers and booms, to be used for the safe keeping of timber by whosoever may chose to place their timber &c. within the same. If the Corporation, then, have only done what the law has authorized them to do, and have erected piers and booms suitable and proper for accomplishing the object contemplated by the Legislature, viz., the protecting and securing timber &c. on its way to the St. John market, and have used all reasonable and proper precautions to make their piers and booms adequate for such a purpose, then, as they have done nothing which there is not clearly granted them power to do by the Act—and there has been no contention that they have been deficient in any particular in this respect, and no question has been raised in reference thereto—we are of opinion that, in the absence of negligence or improper conduct on the part of the Corporation or their servants, they are not liable for any damage resulting from the use of what the Legislature has not only sanctioned and encouraged, but directly authorized and legalized. The casualty, against which the piers and booms were to afford protection, was, no doubt, the getting adrift of the lumber into the main River, and then, perchance, its going out to sea, whereby a probable total loss of the property would be the result, or involving such heavy salvage expenses as to be almost equivalent to a total loss.

Once within the boom, and so secured from dispersion in the boom or from being carried out to sea,each owner was, we think, to

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look after, and take the care of his property as if the boom were his own, subject only to a general superintendence by the Corporation for the general convenience and benefit of all. The boom having been constructed in accordance with the Act, if it is used by any persons in a negligent or improper manner, they may be, and certainly ought to be liable for any loss or damage occasioned by their negligent or improper conduct. But, we can see no reason why the Corporation should be liable for their misconduct. The fact of the Corporation receiving boomage for the use of the boom does not, in our opinion, alter the case. The boomage is paid for the proper use of the booms, not for any negligent or improper use. No person placing property within them for legitimate protection can have any right then to use the privilege thus accorded, otherwise than in a reasonable and proper manner. If he does, and, in consequence, damage is sustained, the party offending, and not the Corporation, should be liable, unless, indeed, the Corporation can by evidence be connected with the negligent or improper conduct, which induced the injury. In this view, we cannot escape the conclusion that the learned Judge was inaccurate in directing the jury, without qualification, that, if the defendants allowed timber within their booms to go adrift, any individual on whose lands the timber drifted, might maintain an action against the Corporation. How far the owners of property having a legal right to place the property within the booms, guilty of no negligence, and having taken all reasonable care and precaution to guard against accidents from ordinary causes, would be liable for accidents arising from extraordinary ones, it is not necessary to discuss; and, if it were legitimately before us, we would have no sufficient materials for deciding the question, because, tho' the timber would appear to have gone out of the boom by reason of a freshet, there does not appear to be any evidence whether this was such an ordinary occurrence, the consequence of which should have been provided against; or whether the damage proceeded from the unforseen result of an extraordinary flood, for the consequences of which they might not be liable; nor whether the owners of the timber in the boom could or could not, by the use of reasonable precaution, have prevented the timber from floating on the plaintiff's land. It is not necessary for us to go through all the cases that bear on the

subject. We may, however, mention a few that seem to bear more directly on the view we have taken of this case.

Rex v. Pease,[1] settled that, where the Legislature has sanctioned the use of a locomotive engine, there is no liability for injury caused by using it, so long as every precaution is taken with its use. And in *Whitehouse v. The Birmingham Canal Company,*[2] it was held that, where a work of a public character, (as a canal) had been constructed under the authority of an Act of Parliament, a right of action for an injury not occasioned wilfully, nor by any act necessarily causing it, but arising from the user of the work (as, for instance, through the overflow of the water of the Canal) must be grounded on negligence, and negligence is of the essence of the action; and, tho' the jury have given a verdict for the plaintiff, and it has been proved that the proximate cause of the injury was an act of the defendants' servants (as raising a flood gate) yet, if it is doubtful whether that act necessarily must have caused the injury, and the jury also find that there was no negligence, the verdict will be entered for the defendant. In the course of the argument, BRAMWELL, B., referred to the cases as to sparks falling from steam engines on railways. POLLOCK, C. B.: "Surely an action would not be maintainable in such cases without negligence, the act itself being not only lawful but actually authorized by Act of Parliament. Could an action be maintained for an injury resulting from running trains in the ordinary way, without any evidence of negligence?" WATSON, B.: "Suppose the declaration in this case, or any similar case, omitted the allegations of negligence, and simply stated that the defendants constructed and kept up a canal or reservoir (which they were authorized to do by Act of Parliament), and that thereby water flowed on the plaintiff's premises, surely that could not be good." And POLLOCK, C. B., again, asks, "Is it not a general principle, that, when something is authorized to be done by an Act of Parliament, no action can be maintained for the consequence of its being done in the ordinary way, and, if it is not so done, is it not a question of negligence?" And, in *Vaughan v. The Taff Vale Railway Co.*[3]

[1] 4 B. & Ad. 30.
[2] 5 H. & N. 928. See the cases cited in note to this case.
[3] 3 H. & N. 679.

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the Exchequer applied the principle established in *Rex v. Pease* to a civil action. COCKBURN, C. J., after stating that the Court were prepared to uphold the principle proceeded on in *Rex v. Pease,* uses this language, "where the Legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the Legislature carries, as we think, this consequence, that, if damage results from the use of the thing, independently of negligence, the party using it is not responsible. It is consistent with policy and justice that it should be so." This principle was acted on and acquiesced in in *Jones v. Festiniog Railway Co.,*[1] in which case the distinction is clearly shewn between the general rule of the common law, that, where a man brings or uses a thing of a dangerous nature on his land, he must keep it on it at his own peril, and is liable for the consequences if it escapes and does injury to his neighbor, as given in *Fletcher v. Rylands*[2] affirmed in the House of Lords,[3] and the rule applying to one who brings or uses a thing under and by virtue of the express authority of the Legislature; and who is thereby relieved from liability to the consequences at common law. As to the trespass count, we think there should be some evidence to fix the fastening of the timber to the trees on the defendants—either that the act was done directly by the Corporation and their servants, or with their knowledge and assent, or that, having been done by others, the Corporation adopted the act,—and, in this case, the Superintendent proved it was not done by the Corporation or with its consent. As we think the individual caring for the timber and seeing that it was properly and securely fastened and kept, was the duty of the owners, and that the defendants' interference with it was only to be under certain circumstances, and then they were authorized to do only what the owners should have done, and, doing it, as it were, for them and at their expense, we should think, if there was any presumption, it would be presuming that the owners, and not the Boom Company, had so fastened the timber. But, considering the defendants' connection with the timber, and right to control its position, if improperly placed in the booms by the

[1] L. R. 3 Q. B. 733.
[2] L. R. 1 Exch. 265, 279.
[3] L. R. 3 H. L. 330.

owners, we are inclined to think, though there must be some evidence, slight evidence would be sufficient to make out a *prima facie* case to go to the jury; and also because such a *prima facie* case could easily be rebutted by the defendants, if the act complained of was not done by the Company, or their servants, or with their knowledge and assent. We cannot think that the mere fact of the Corporation being entitled to boomage raised any presumption against them; or the mere fact of their receiving boomage was of itself such an adoption of the act of the owners, if done by them, as would make the Corporation liable as trespassers. The boomage is paid and received as a compensation for the proper use of the boom and has nothing to do, as we can see, with negligent or improper use of or dealing with the boom, or dealing with any property deposited therein. If the plaintiff's contenton on this point should prevail, the owners of property might, by wrongfully or negligently dealing with it, without the knowledge of the defendants, and thereby trespassing on the shores within the booms, prevent the Company from receiving the legitimate boomage, unless, by so doing, making themselves liable for damages for injuries the owners have committed, and which may far exceed in value the amount of the boomage, and which may have been done without their knowledge or sanction—a result we think the law never could have contemplated, and which no principle or anything that we are aware of will sustain. Inasmuch, then, as we cannot discover any duty or obligation on the defendants which they have omitted or neglected, or in the performance of which, they have misconducted themselves, or acted negligently, so that they have been guilty of any misfeasance, malfeasance or nonfeasance, by reason whereof damage has accrued to the plaintiff, we think the judgment should be for the defendants.

The learned Chief Justice also, in delivering the judgment, referred to the cases of *Aldridge v. The Great Western Railway Company;*[1] *Piggott v. The Eastern Railway Co.;*[2] *Counties Railway Co.;*[3] *Carpue v. The London and Blackwall Railway Co; Stephens v. Jeacock;*[4] *Holden v. The Liverpool Gas Co.;*[5] *Wilson v. Newberry.*[6]

[1] 3 M. & Gr. 315.
[2] 13 L. J. Rep. N. S. Q. B. 133.
[3] 3 C. B. 229.
[4] 17 L. J. Rep. N. S. Q. B. 163.
[5] 3 C. B. 1.
[6] L. R. 7 Q. B. 33.

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RYAN *v.* JAMES.

Evidence—Damage—General assertion insufficient—Execution—Alias Writ—Excessive Amount—Arrest.

A plaintiff giving evidence on his own behalf cannot be allowed to state that he has sustained a certain amount of damage by the act of the defendant: he should state the facts on which he relies to prove his damages, from which the jury are to determine the amount.

If an execution issues upon a judgment in a Justice's Court within the time limited by the 1 Rev. Stat. c. 137, § 38 an *alias* or *pluries* may afterwards issue, though more than three years have elapsed since the judgment. *Semble*, That an execution issued by a Justice of the Peace for more than the amount of the Judgment is irregular only, and the mere arrest of the defendant under it, is not necessarily a wrong, but otherwise, if he is imprisoned under it for a greater number of days than is allowed by law according to the sum actually due.

Appeal from the decision of the Judge of the Kent County Court, refusing the defendant a new trial. The facts of the case are sufficiently stated in the judgment.

April 13. *James* for the appellant.

A. L. Palmer, Q. C., contra.

James, in reply.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

ALLEN, J. This was an action for false imprisonment, tried in the County Court of Kent, in which the defendant justified under a judgment and *pluries* execution in a Justice's Court. The Judgment was for the sum of £4 11s 2d; in the body of the execution the amount to be levied was stated to be £5 11s 2d; but a direction was indorsed to levy for £5. 15s. 11d.—the additional sum of 4s 9d being made up by the costs of several executions which had been issued. The judgment was signed in March, 1863; an execution was issued thereon in April, 1864, and several others between that time, and the issuing of the present execution —11th June, 1869.

It appeared by the plaintiff's evidence that he had been arrested on a previous execution issued on this judgment in June, 1869 and had remained in gaol 47 days, when he was discharged by the Sheriff, under the provisions of 1 Rev. Stat. c. 137, § 40.

The Judge directed the jury that the execution was

justification of the arrest; 1st, because it was issued more than three years after the signing of the judgment; and 2nd, because it varied from the judgment in the amount. A verdict was given for the plaintiff for $20.

A new trial was moved for on the ground of misdirection as to the time of issuing the execution, and also on the ground of the improper admission of the following question put to the plaintiff on the trial: "What damage have you sustained by this imprisonment?" To which he answered, that he had sustained damage to the amount of $100. A new trial was refused, from which the defendant has appealed.

As to the objection to the evidence, we think such a question is improper—unless it is accompanied with a direction by the Judge to the witness, that he must specify the particular causes for which he claims damages, and the amount which he may have been obliged to pay by reason of the wrongful act of the defendant; for instance, in the present case—how much he paid the Sheriff or gaoler for fees consequent on the arrest, how much he was obliged to pay for his board while on the limits; and how much he could have earned if he had not been deprived of his liberty; but not, as in the present case, to assess his own damages. This point has already been determined by this Court in the case of *Domville v. Kevan.*[1] It is said, however, that in this case, the plaintiff has shewn how the amount of the damages was made up, and therefore the general questions, and the answers thereto became immaterial. The plaintiff was confined on the limits for twenty weeks, and he says that during that time he paid 12s 6d a week for his board, and 17s. 6d. for the limit bond and gaol fees. The action was commenced about five weeks after the arrest: therefore the sum actually paid by the plaintiff for board up to that time would be about £3. 2s. 6d., which, together with what he paid the Sheriff, would amount to £4—only a trifling sum less than the damages given in this case If this was the only question, we should not be disposed to disturb the decision of the County Court—the damages appearing to be reasonable, and warranted by that part of the evidence which was unobjectionable. As to the

[1] East. T. 1871.

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execution, we think that, as a first execution issued within time required by the Act, an *alias* and *pluries* might afterw issue, though more than three years had elapsed since the s ing of the judgment. On this point, therefore, the direction the Judge was wrong. On the other ground,—the varia between the judgment and the execution—we incline to th that this was only an irregularity. In *Carman v. Wilson,*[1] it held by the Court that an execution varying from the amo of a judgment in a Justice's Court, was irregular only It is tr that, in that case, the execution issued for a less sum than judgment, which was for £3. 7s., and the execution for 3 but, if the fact of its varying from the judgment would mak a nullity, it would seem to be immaterial whether it issue fo greater or lesser sum. In *Stewart v. Hazen,* an *alias* execut issued from a Justice's Court before the return of the first ex tion was held to be irregular only; though according to the it ought not to have issued until the first execution was retur unsatisfied. Where the Court from which the process issues, jurisdiction over the subject matter, the disposition is, to t variances from the prescribed practice as irregularities only, not as nullities.

In the Superior Court, such a variance as existed in this c would be amendable, even after the arrest under the w *McCormack v. Melton;*[3] *Evans v. Maners;*[4] *Saxon v. Castle;*[5] no action would lie without proof of malice, or, that the debtor sustained damage thereby: *De Medina v. Grove.*[6] If there good judgment, the debtor suffers no wrong by the mere a under an execution issued upon it, though it may be indorse levy more than is due, for it is his duty to pay the debt. I tendered the amount actually due, the creditor would be boun accept it, and to discharge him, and if he refuses to do so, the sequent detention would be wrongful: *Crozer v. Pilling.*[7] in case of executions issued out of Justices' Courts—the impr ment of the debtor for a greater number of days than is all by the fortieth section of the Act, according to the sum act

[1] Trin. T. 1864.
[2] 2 Allen 254.
[3] 1 A. & E. 331.
[4] 9 Dowl. 256.
[5] 6 A. & E. 652.
[6] 10 Q. B. 152.
[7] 4 B. & C. 26.

ıe, would be illegal; but the mere imprisonment of the debtor ıder the execution would not necessarily be a damage. We therere think the direction on this point was wrong.

The main question in this case seems to have been overlooked: -namely, whether the plaintiff had been arrested under a previous :ecution, and undergone the number of days imprisonment entioned in the Act? As this question was not submitted to the ıry, nor adjudicated upon by the Judge, but the case was decided ı points which we think are not tenable, there should be a new 'ial. The appeal will be allowed and the cause remitted to the 'ounty Court for the purpose of a new trial.

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rbitration and award—Further information after close of evidence.

'hen, after the evidence had closed, and the attorneys for the parties had left the room, the defendant's attorney made a communication to one of the arbitrators respecting the matter in controversy, in consequence of which the arbitrators obtained further information on the subject, and one of them swore that his decision was materially influenced thereby; an award in favor of the defendant was set aside, though the other arbitrators swore they were not influenced by the subsequent information.

This cause was referred by rule of Court at the York Sittings, ‹ctober, 1871.

An award having been made for the defendant, in the following Hilary Term, *Gregory* obtained a rule *nisi* to set the same aside, ɔn the grounds of the improper conduct of the defendant's ıttorney in interfering with the arbitrators and giving them ıformation on which they acted, and also of the arbitrators 'ceiving *ex parte* evidence.

April 24. *Needham* shewed cause.

Gregory was heard in support of the rule.

Cur. Adv. Vult.

'he judgment of the Court was now delivered by

LLEN, J. We think the award in this case ought to be set aside.

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Without going into the merits of the question before th trators—which we disclaim any intention of doing—we shut our eyes to the fact that the payment of the $350 note defendant was a matter in controversy before the arbitrators the arbtirators did receive evidence respecting the payment note after the case had been closed and the counsel for the had been dismissed, is not disputed; and that such evider obtained from the Bank in consequence of the statement n Mr. Richards by the defendant's attorney, is also very e That evidence may, or may not, have influenced Mr. Richa Mr. Clark—but Mr. Gill, the other arbitrator, swears that powerfully influenced by it in agreeing to the award; an very difficult for any person to say that he was not, or wo be influenced by such information. It is made out to ou faction, that one, at least, of the arbitrators, gave his as the award in consequence of evidence improperly obtained, think such an award ought not to stand.

Where arbitrators receive evidence for one party, in the a and without the consent, of the other party, the award will aside without considering the nature of the evidence, or the bility of its having influenced the decision: *Dobson v. G*

In addition to this, it appears to us to be an insuperable tion to this award being sustained, that the defendant's at without the knowledge of the plaintiff's attorney, made munication to one of the arbitrators after the hearing wa upon which he and the other arbitrators acted before they their award.

The rule will be made absolute to set aside the award—w costs.

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[1] 6 Q. B. 637.

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ity—Property taken subject to covenant—Knowledge of party—Equitable rights—Specific performance—Restraining by injunction until fulfilment of covenants—Remedy at law, its effect on jurisdiction of Equity—Agreement for compensation—Statutory remedy for assessment not applicable.

If a party takes property, with knowledge that the person through whom he claims has covenanted to use it in a particular way, he takes it subject to the equity created by that party; and a specific performance of the agreement will be enforced against him.

The St. John Water Company, under the authority of their Act of Incorporation, 2 Wm. 4. c. 26, covenanted with the owner of land, which they required to overflow, that they would build a bridge over the overflowage to enable him and his assigns, &c. to pass from one part of his farm to the other, and would keep the bridge in repair so long as the overflowage continued. The bridge was built and kept in repair until all the rights and property of the Company, subject to outstanding liabilities, were vested in Commissioners (the defendants) by Act 18 Vic. c. 38; saving to every person all rights and remedies in law or equity; and all actions or suits pending, or thereafter to be brought against the Company, for or by reason of any malfeasance or misfeasance or any act done or committed, or by any contract or agreement theretofore made —which rights and remedies should continue as if the Act had not been passed. The defendants continued the overflowage, but refused to keep the bridge in repair. The plaintiff having become the owner of the land, filed a bill for specific performance of the covenant, and to restrain the defendants from overflowing his land.

Held, 1st. That the defendants, having taken the property of the Water Company subject to the outstanding liabilities, were bound by the covenant to keep the bridge in repair.

That the reservation in the Act, of rights and remedies against the Company, only applied to actions pending, and rights of actions accrued before the passing of the Act; and not to a breach of contract, or wrong done, by the Commissioners, though such contract had been entered into by the Company.

That the plaintiff had a remedy in equity against the Commissioners for a specific performance of the covenant, and that they should be restrained by injunction from overflowing his land until the bridge was put in a proper state of repair, and also from allowing the bridge to remain out of repair while they continued to overflow the land.

That, though the plaintiff might have a remedy at law on the covenant, that did not oust the jurisdiction of equity.

That, the mode of compensation for the overflowage having been agreed between the Company and the owned of the land, the statutory remedy of assessment by a jury did not apply.

is was an appeal from the decision of Mr. JUSTICE ALLEN, ing a demurrer to the plaintiff's bill filed for the purpose ning specific performance of an agreement entered into by John Water Company with Andrew G. Crookshank, to bridge across a stream flowing through his land and to same in repair, and to restrain the defendants from over- the plaintiff's land until the bridge was repaired.

agreement so far as it effected the present question, was lowing words:—

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"This Indenture made the 16th Sept., 1852, between *'Tl John Water Company'* of the one part, and *Andrew G. Crook's* of the Parish of Simonds, in the County of St. John, of the part: Whereas the said *St. John Water Company,* in furni the City of St. John with water, have constructed a dam upc said Company's lands, near lands owned and occupied by th Andrew G. Crookshank, in the Parish of Simonds, and in quence of such erection, have caused an overflow of water u portion of the said A. G. Crookshank's lands, to the exte fifteen acres of land, more or less; And Whereas, the sai John Water Company and the said Andrew G. Crookshar way of compensation and settlement of all claims and der for damages and charges, for and on account of the overfl of the said Crookshank's land by the dam aforesaid, have er into the following agreement, that is to say: It is mutually a by and between the parties, and this indenture witnesseth th said Andrew G. Crookshank for and in consideration of the of £125, of lawful money &c., to him paid by the said St. Water Company, the receipt whereof &c. shall and will fort sell and convey to the St. John Water Company and their as in fee simple, free of all incumbrances, fifteen acres, more o of his said land, so covered by water, thrown back by the aforesaid, that the said St. John Water Company, and assigns, shall have and enjoy the right and privilege of overfl from time to time, as much over and above the said fifteen of the lands of him the said Andrew G. Crookshank, as m covered by any freshet in the river or stream running int dam, in consequence of the dam at present erected, withou claim or damage either in law or in equity, of him the said A G. Crookshank, his heirs or assigns, or any other person or pe against them the said St. John Water Company, or their assig way of damages or compensation or otherwise howsoever; Th said St. John Water Co., or their assigns, shall and will buil construct a good and sufficient bridge for farm purposes acro said overflowage, where they, the said St. John Water Com may deem it most expedient for the uses and purposes c said Andrew G. Crookshank's farm, and for him, the said A G. Crookshank, his heirs and assigns, by himself and them

and his and their servants and workmen, as well with, as without horses, teams, and cattle, over, upon, and along the said bridge at all times to pass and repass, and that they the said St. John Water Company and their assigns, shall and will keep the said bridge in proper repair, so long as the said overflowage continues, and renders such bridge necessary for the purposes of the said Andrew G. Crookshank's farm; and that the said bridge shall be built on or before the 1st September, 1853."

The plaintiff claimed the land under conveyance from Crookshank, subsequent to the agreement with the Water Company; and the defendants stood in place of the Water Company by virtue of the Act of Assembly 18 Vic. c. 38. The bill alleged that the agreement was duly registered; that the Water Company built a sufficient bridge over the overflowage, before the 1st September, 1853, and kept it in proper repair until the property and rights of the Company were transferred to the Commissioners: that the defendants, after their appointment, continued the overflowage, thereby rendering the bridge necessary for the purposes of the farm; that the bridge had become, and was wholly out of repair, and unfit for the purposes of the farm; and that the defendants not only refused to repair it, but denied all liability to do so, although they claimed the right to, and continued to overflow the plaintiff's land. The injunction restrained the defendants from overflowing, or continuing to overflow the plaintiff's land by means of the dam erected by the Water Company, and continued by defendants across Little River, until the bridge erected by the Water Company across the overflowage, or the said land, should be put in proper repair for the purposes of said farm, according o the covenant of the said Water Company made with Crookshank; lso, from hindering and preventing the plaintiff from having the ull use, benefit and enjoyment of his farm by keeping a part of he same overflowed, and by allowing the bridge erected by the Water Company, across the said overflowage, to remain, or to become out of proper repair for the purposes of the plaintiff's farm, contrary to the covenant contained in the said indenture.

Feb. 23. *S. R. Thomson, Q. C.,* was heard on behalf of the appellants.

C. W. Weldon, for the respondents.

Thomson, Q. C., in reply.

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Besides the cases referred to in the judgment, the following cases and authorities were cited: *Dover Harbour (Wardens &c.) v. South Eastern Railway Company;*[1] *London and Northwestern Railway Company v. Bradley;*[2] *Williams v. Earle;*[3] *West v. Dobb;*[4] *Martyn v. Clue;*[5] *Bowes v. Law;*[6] Ang. Corp. 271. *Burnett v. Lynch;*[7] *Walker v. Bartlett;*[8] *Simpson v. The South Staffordshire Water Works Company;*[9] *Bailey v. DeCrespigny;*[10] *Stevens v. Great Western Railway Company;*[11] *McLeod v. Commissioners E & N. A. Railway.*[12]

Cur. Adv. Vult.

The judgment of the court (ALLEN, WELDON and FISHER, J. J.) was now delivered by

WELDON, J. The principal questions argued before us in this case were:—1st. Whether the Water Company had power to make such an agreement as was made with Crookshank; 2nd. If they had power, whether the plaintiff's remedy was not against the Water Company, under the Act 18 Vict. c. 38; 3rd. Whether specific performance of the agreement could be decreed; 4th Whether the remedy was not by assessment of the plaintiff's damages by a jury summoned under the Act; 5th. Whether the proceeding should not have been in the name of Crookshank; and 6th. Whether the bill sufficiently alleged notice to the defendants that the bridge was out of repair, and a request to repair it.

As to the first question—that the agreement was *ultra vires*—a Corporation may make any contract connected with the purposes of its incorporation, except where the statute by which it is erected or regulated, expressly, or by necessary implication, prohibits such a contract: *Scottish Northeastern Railway Co. v. Stewart;*[13] *South Yorkshire Railway Co. v. Great Northern Railway Company;*[14] *Chambers v. Manchester & Milford Railway Co;*[15] *South Wales Railway Co. v. Redmond;*[16] *Shrewsbury and Birmingham Railway Co. v. Northwestern Railway Co.;*[17] *Taylor v. Chichester & Mid-*

[1] 9 Hare 489.
[2] 5 E. L. & E. 100.
[3] L. R. 3 Q. B. 739.
[4] L. R. 4 Q. B. 634.
[5] 18 Q. B. 661.
[6] L. R. 9 Eq. 636.
[7] 5 B. & C. 589.
[8] 18 C. B. 845.
[9] 34 L. J. Ch. 380.
[10] L. R. 4 Q. B. 180, 186.
[11] 27 U. C. R. 38.
[12] 1 Han. 574.
[13] 5 Jur. N. S. 611; 3 Macq. H. L. C. 382.
[14] 9 Exch. 55.
[15] 10 Jur. N. S. 700; 5 B. & S. 588.
[16] 10 C. Bench, N. S. 675.
[17] 6 H. Lords' C. 136.

hurst Railway Company.[1] Then, is there anything in the Act 2, Wm. 4, c. 26, incorporating the St. John Water Company, or in the Act in amendment of it—12 Vict. c. 51—which, either expressly, or by necessary implication, would prohibit the Company from entering into such an agreement?

The 15th Sect. of the 2 Wm. 4, c. 26, authorizes this Corporation to draw water from, erect reservoirs on, and carry pipes and conductors through private property, where it may be necessary, upon paying reasonable compensation therefor, and for any damage sustained by the operations of the Company; and in case the owners of the land and the Company cannot agree upon the amount, it is to be determined by three arbitrators; and if the owners of the land refuse to appoint an arbitrator, the Supreme Court, on application of the Company, is to issue a warrant to the Sheriff of the County to summon a jury, who shall "assess and ascertain the sum or sums of money, or annual rent to be paid for the use and convenience of such private property, or the indemnification to be made for the damage that may or shall be sustained."

The Act 12 Vic. c. 51, § 6, which gives the Company additional powers to enter on private property for the purpose of procuring a supply of water, and to build dams or embankments on any stream, &c., for the purpose of erecting artificial ponds or reservoirs, and overflowing private property, directs that the compensation to be paid to the owners of lands for the damages done by any such operations of the Company, shall be settled and determined in the manner directed by the Act 2 Wm. 4, c. 26.

There is nothing in these Acts to shew that the conpensation to be allowed to the owner of land taken, or overflowed by the works of the Company, necessarily means a money payment.

The Act 2 Wm. 4, seems to point to three modes of compensating the owners of land affected by the operations of the Company:—1st. The payment of a distinct sum of money for taking the water or using the land; 2nd. An annual rent therefor; and 3rd. Indemnification for the damages sustained.

By the term "indemnification," the Legislature must have intended something different from either the payment of a gross sum of money, or an annual rent. Ordinarily, indemnification

[1] 2 Law R. Exch. 356 per Willes & Blackburn, J. J.

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means, saving a person harmless, or securing him against loss or damage. Then, where the Company entered into the agreement with Crookshank, to build the bridge, and to keep it in repair so long as they continued to overflow the land, they undertook to indemnify him and his assigns against the loss or damage which he or they might sustain by not being able to pass from one part of the farm to the other, in the way they could do before the land was overflowed. The agreement, therefore, seems to us to be entirely within the powers given to the Company, to make a reasonable compensation to the owners of lands for the use of the same, and for all damages sustained by the operations and works of the Company. What good reason could there be for compelling the Company absolutely to purchase land which they may require to overflow in the course of their operations, if they can obtain that right by the payment of an annual rent, or, what is substantially the same thing, by keeping a bridge in repair? They are authorized to overflow lands by means of dams and embankments, and to "continue such overflowage as long as they shall see fit." It might happen that they would only require to overflow lands temporarily; or, by alterations in their works, or by making other streams of water available, they might deem it necessary to remove certain dams or embankments which had caused an overflowage. In such case, it would be clearly for the interest of the Company that they should have power to agree with the owner of the land for the payment of an annual rent, while they continued to overflow the land.

The next objection was that the plaintiff's remedy was against the Water Company. By the Act 18 Vic. c. 38, authority was given to appoint three Commissioners for the purpose of procuring a supply of water, who were to issue certain debentures to the Stockholders in the St. John Water Company, "and thereupon, the entire property, works, revenues, rights and credits of the said Company, subject to the outstanding liabilities of the said Company, shall become vested in the said Commissioners and their successors, without any other act or conveyances whatever, with all the powers and privileges now held and enjoyed by the said Company under any law or laws of the Province; saving, however, to all and every person or persons, Company or Corporation, all

legal rights or remedies in law or equity, and all actions or suits now pending, or hereafter to be brought against the said Company for or by reason of any malfeasance or misfeasance, or any act or thing heretofore done or committed, or for or by reason of any covenant, contract or agreement heretofore made; which rights and remedies shall continue, and the actions and suits be brought, prosecuted and ended, as if this Act had not been passed."

We think the intention of that section was to preserve the liability of the Company for rights of action which had accrued, either for torts or breaches of contract, at the time the Act came into operation; that the Company should continue liable for any wrongs or breaches of contract which took place during their time; but not for breaches of contract by the Commissioners, though such contracts had been entered into by the Company; that all the liabilities of the Company were imposed upon the Commissioners, except in those cases where actions had either been commenced against the Company, or where rights of actions had already accrued against them for wrongs done, or breaches of contract committed—thus making the Company and the Commissioners respectively liable only for their own acts. Consequently, as the breach of contract in this case was by the Commissioners, the remedy must also be against them, as they took the property of the Company subject to the outstanding liabilities.

Another objection was, that an injunction would not lie in this case, because the keeping the bridge in repair was a continuous liability; and the case of *Blackett v. Bates*[1] was relied on in support of that position, and to shew that a party would not be decreed to perform a continuous agreement extending over a term of years; but only where the performance can be enforced at once. The principal difficulty in that case, however, was, not that the *defendant* could not be compelled at once to perform the whole of his agreement; but that there were continuous duties to be performed by the *plaintiff*, which the Court had no means of enforcing, and, therefore, if the defendant was compelled to perform his part of the agreement, there would be no mutuality. *Hills v. Croll*[2] was decided on the same principle. But here there

[1] 1 Law R. Ch. 117.

[2] 2 Phill. 60.

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is nothing to be done by the plaintiff—the agreement is executed so far as he is concerned—for the defendants have got the use of his land, and continue to overflow it under the terms of the agreement, and all that is required is, that they should perform their part of it. In *Storer v. The Great Western Railway Company,*[1] the defendants had agreed to construct an archway of a certain description on the plaintiff's land, and forever after keep it in repair, in consideration of being allowed to carry their railway through his land: they constructed the railway and continued to use it, but refused to build the archway. The plaintiff there, as here, had performed his part of the agreement, and the Court decreed performance against the defendants, in the terms of the agreement. That cas, so far as we are aware, has never been questioned; but, on the contrary, it has been followed in several recent cases, viz: *Wilson v. The Furness Railway Company;*[2] *Green v. West Cheshire Railway Company;*[3] and *Attorney General v. Mid-Kent Railway Company.*[4] In two of those cases, the agreement of the defendants was, not merely to construct a road for the plaintiff, but to keep it in repair, yet that was not considered to be any objection to a decree for specific performance of the agreement. It would be most unjust that, which the defendants are receiving the full consideration of the agreement with Crookshank, by continuing to overflow the plaintiff's land for the purposes of their works, they should be allowed to refuse to perform their part of the agreement, to keep the bridge in repair. They can at any time get rid of the obligation to repair the bridge by discontinuing to overflow the plaintiff's land; but, if they claim to take the benefit of the agreement, upon what principle can they refuse to perform its obligations? It is one of the "outstanding liabilities" of the Water Company, which the Commissioners assumed, when all the rights and property of the Company were vested in them by virtue of the Act 18 Vic. c. 38. The keeping the bridge in repair was an equity which attached to their use and occupation of the plaintiff's land by the overflowage. In *Tulk v. Moxhay,*[5] the plaintiff, being the owner of a piece of land or garden in Leicester Square, conveyed it in fee to one Elms, who convenanted with the plaintiff, that he

[1] 2 Y. & C. 48.
[2] 9 Law R. Eq. 28.
[3] 13 Law R. Eq. 44.
[4] 3 Law R., Ch. 100.
[5] 18 Law J. Ch. 83; 2 Phil. 774; 1 H. & Tw. 105.

(Elms), his heirs and assigns, should forever thereafter keep and maintain the ground in its then present form, and in sufficient repair, as a garden and pleasure ground, in an open state, and uncovered with any buildings. The defendant had become the owner of the ground, under a title derived from Elms, and had commenced cutting down the trees upon it, with a view of erecting shops and other buildings. He had notice of Elms' covenant at the time he purchased, and an injunction was granted to restrain him from using the ground in any manner different from the terms of that covenant. On an application to the Lord Chancellor to dissolve the injunction, he said, "I do not apprehend that the jurisdiction of the Court is fettered by the question whether the covenant runs with the land, or not. The question is, whether a party taking property, the vendor having stipulated in a manner binding, by the law and principles of this Court, to use it in a particular way, will be permitted by this Court to use it in a way diametrically opposite to that which the party has covenanted for. * * * * If there be a merely legal agreement, and no covenant—and no question about the covenant running with the land—the party who takes the land, takes it subject to the equity which the owner of the property has created: and, if he takes it, subject to that equity, created by those through whom he has derived title to it, is it not the rule of this Court that the party, who has taken the property with knowledge of the equity, is liable to the equity? Is not this an equity attached to the property by the party who is competent to bind the property? * * * * Here, there is a clear, distinct, and admitted equity in the vendor, as against Mr. Elms; and, as to the party now sought to be affected by it, it is not in dispute that he took the land with notice of the covenant: indeed, it appears on the face of the instrument which is the foundation of his title. It seems to me to be the simplest case that a Court of Equity ever acted upon, that a purchaser cannot have a better title than the party under whom he claims."

It is no answer to this application to say that the plaintiff has a remedy at law on the agreement, for, even if he has, that does not oust the jurisdiction of this Court: *Lumley v. Wagner;*[1] *Attorney General v. Mid-Kent Railway Company.*[2]

[1] 1 D. M. & G. 604. [2] 3 Law R. Ch. 100.

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It was further contended that this was not a case for specific performance, because the Act 18 Vic., c. 38, pointed out a mode for parties, whose lands had been damaged by the works of the Company, to obtain compensation; and, in support of this, were cited, *Gattke's case*,[1] and *The London and Northwestern Railway Company*,[2] which decided, that where a statute prescribes a mode by which compensation shall be recovered for certain injuries, it, in effect, deprives the party of all other legal remedies. We do not dispute that principle, but it does not touch the present case, because here, the owner of the land and the Company have already agreed upon the compensation to be allowed for the overflowage; and it is only in the event of their not being able to agree, that the statutory mode of settling the compensation is to be adopted.

We think this was a covenant running with the land, which the plaintiff, as assignee, was entitled to the benefit of; but whether it is so, or not, is not material, for, according to the case of *Tulk v. Moxhay*, it is an equity attaching to the land in the hands of the defendants; and, at all events, it is one of the "outstanding liabilities" of the Water Company, which the defendants assumed under the Act 18 Vic.

We cannot see what necessity there was for making Crookshank a party to the suit. Having conveyed the property to the plaintiff, he cannot possibly have any interest in the subject-matter of the suit; for the bill alleges that the bridge was kept in repair until the transfer of the land to the plaintiff; therefore, no breach of the agreement took place in Crookshank's time, and he could not properly have been made a party.

The only remaining objections are—that the bill does not allege any notice to the defendants that the plaintiff was the owner of the land; or that the bridge was out of repair, or any request to repair it. The bill is certainly somewhat loosely drawn in these particulars; but it is very evident that neither of these objections is the substantial ground of defence, nor could the defendants have been in any way misled by the manner in which these facts are stated in the bill. If they had notice that the bridge was out of repair, it was their duty to repair it, whoever was the

[1] 15 Jur. 261.

[2] 15 Jur. 639; 3 Mac. & G. 336.

owner of the land; for the agreement was, to keep the bridge in repair, so long as the overflowage continued, and rendered such bridge necessary for the purposes of the farm. They admit that they continued to overflow the land, and they knew that, while they did so, it was their duty to keep the bridge in repair. The bill alleges that the defendants "not only refuse to repair the bridge, but deny all liability to repair the same, notwithstanding that they claim the full right to, and do overflow the plaintiff's land." By demurring, the defendants admit the truth of the allegation. A refusal to repair implies a request to do so; for a man cannot be said to refuse to do something that he has never been asked to do. The refusal to repair the bridge, coupled with the denial of their liability, and their claim of right to overflow the land, shew what their substantial ground of defence is; we, therefore, think this part of the bill is sufficient.

For these reasons, we are of opinion that the injunction was properly granted, and that the appeal must be dismissed with costs.

Appeal dismissed with costs.

DIBBLEE *v.* WOOD.

Attorney's action on bill—Settlement of suit—Material question for jury—Defence.

1872.
April

Where the defence to an action on an Attorney's Bill is that the costs were incurred in a suit which the attorney had settled without the defendant's authority, it is a material question for the jury in determining whether the defendant obtained any benefit from the plaintiff's services, to ascertain whether the previous suit was settled with his consent.

Appeal from the decision of the Judge of the Kent County Court refusing the defendant a new trial.

April 13. *James,* for the appellant.

E. L. Wetmore, contra.

James, in reply.

Cur. Adv. Vult.

The Judgment of the Court (RITCHIE, C. J., and ALLEN, WELDON and FISHER, J. J.) was now delivered by

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ALLEN, J. This was an appeal from the County Court of Kent. It was an action for the amount of an attorney's bill, the defence to which was, that the plaintiff had settled a suit in the Supreme Court, in which he was the attorney for the present defendant, contrary to his directions; whereby the work done by the plaintiff, as attorney in that suit, became altogether useless to the defendant.

We think it was a material question for the consideration of the jury in this case, in determining whether the defendant obtained any, or what amount of benefit from the services of the plaintiff, to ascertain whether the previous action was settled with the consent of the defendant. See, as to the power of an attorney to compromise a suit, *Fray v. Voules*;[1] *Chown v. Parrott*;[2] *Prestwich v. Paley*;[3] *Cox v. Leech*.[4] Though the jury, or some, or one of them, did state at the time the verdict was given, that the settlement of the suit was made with the defendant's consent, that does not appear to have been one of the questions submitted by the Judge for their consideration, nor one to which their attention would be specially directed when they retired from the Court to consider upon their verdict. The question put to the jury when they gave their verdict, and their answer to it, could not cure a previous misdirection. We, therefore, think the appeal must be allowed, and the judgment of the County Court be reversed.

Appeal allowed.

1872. April

McGOLDRICK *et al v.* THE EASTERN EXPRESS COMPANY

Contract—Liability to insure goods—Completion of contract.

Plaintiffs applied to the agent of the defendants at Fredericton, to forward a case of furs to Halifax to be sent to London, stating that they wished to have them insured. The agent said that he could not get marine insurance in Fredericton, but that if the plaintiffs would write to S., the agent of the Company at St. John, he had no doubt he would do it, as he had done so for others. On the following day, the agent of the Company at Fredericton, received the furs from the plaintiffs, and signed a receipt stating that they were to be forwarded and delivered to the nearest connecting Express—nothing being stated in the receipt about insurance. The furs were sent to S. at St. John, and were by him forwarded to Nova Scotia, and there taken charge of by another Company, who shipped them to London, and they were lost. At the time plaintiffs delivered the invoice of the furs to the agent at Fredericton, they also delivered him a letter addressed to S., in which the plaintiffs stated that they wished S. to insure $600 on the furs, and to forward them to Halifax immediately, as they wished to have them in London at a particular time. S. did not insure.

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[1] E. & E. 839.
[2] 14 C. B., N. S. 74.
[3] 18 C. B., N. S. 806.
[4] 1 C. B., N. S. 617.

n being brought against the defendants for neglecting to insure.
. the contract was complete when the agent in Fredericton received the
l gave the receipt, which contained the terms of the contract; and that
er to S. was only a request to insure, and formed no part of the con-
r the transmission of the furs.

plaintiffs applied to Mr. Byrne, the agent in Fredericton of
ern Express Company, to forward a case of furs to Hali-
be sent to London, stating that he wished to have them
The agent said that he could not get marine insurance
ericton, but that, if they would write to Mr. Stone, the
the Company at St. John, he had no doubt he would do
had done so for others. On the following day, the agent
ericton received the furs from the plaintiffs, and signed
the following receipt:—

N EXPRESS COMPANY,

FREDERICTON, 11 January, 1870.

ved of F. & O. McGoldrick a case and package said to con-
, valued at $805, directed to Messrs. C. M. Sampson & Co.,
which the Eastern Express Company agree to forward and
t destination, if within route, and if not to deliver to the
ıg express, stage or other means of conveyance at the most
nt point and to be responsible for such delivery to the
of fifty dollars only unless as stated above. It is further
that they shall not be held responsible for any loss
d by fire, or the damages of railroad, steam or river navi-
r for breakage of glass or other fragile goods.
he Eastern Express Company,

(Signed) J. G. BYRNE."

furs were sent to Mr. Stone, at St. John, and were for-
to Nova Scotia, and then taken in charge by another
, who shipped them to London, and they were lost. At
the plaintiffs delivered the invoice of the furs to the
Fredericton, they also delivered to him the following
dressed to Mr. Stone:—

FREDERICTON, January 19th, 1870.

STONE,

nt one case and package of furs through your express for
mpson & Co., London, and we want you to insure them
ndred dollars, and we want you to forward all the expenses
Sampson, London. Ship them on Wednesday morning
Annapolis, as we want to have them in time for the sale.

Yours truly,

F. & O. McGOLDRICK."

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McGOLDRICK v. THE EASTERN EXPRESS CO.

The plaintiff, Francis McGoldrick, gave this account of this letter: "I went to Byrne's (the agent of the defendants at Fredericton) office on the 10th January; I told him I had a package of furs to send to London by Express. I said I wanted to get him to insure them. I told him if the Express could not insure them, I would have to send them through Mr. Masters. I said I wanted them shipped by the steamer leaving Halifax on 14th January. Byrne said, 'I cannot get any Marine Insurance here, but, if you write to the agent, Mr. Stone, I have no doubt he will insure for you—he has insured the same way for Mr. Lemont.' I said, 'All right, I will go and get my papers ready and pack my furs.' I did so." This letter Francis McGoldrick stated was read by Byrne and put in an envelope, together with invoice papers in duplicate, the envelope directed to the Eastern Express Company, St. John. It appeared from the evidence of Stone subsequently, that the insurance affected for Lemont was not made by him as agent for the Company, but was made in his private capacity, quite outside of his position of agent.

Stone did not comply with the plaintiffs' request, and they now brought the present action against the Company for neglecting to insure. The cause was tried at the York Sittings in May, 1871, before WETMORE, J., when a verdict was entered for the plaintiffs, leave being reserved to the defendants to have a nonsuit entered, if the Court should be of opinion there was no obligation on the part of the defendants to insure. In the following Trinity term, *Duff, Q. C.*, obtained a rule *nisi* to enter a nonsuit, pursuant to such leave, or for a new trial.

Oct. 25 and 26. *Fraser* shewed cause, and cited *Storey Ag-* § § 187, 190; *Smith v. Lascelles;*[1] *Pars. Con.* 50.

Duff, Q. C., was heard in support of the rule, and cited *Slim v. Great Northern Railway Company*[2] *Chit. Car.* 34, 35; *Coleman v. Riches;*[3] *Callander v. Oelrichs.*[4]

Cur. Adv. Vult.

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[1] 2 T. R. 189.
[2] 14 C. B. 647.
[3] 16 C. B. 104.
[4] 5 Bing. N. C. 58.

:he judgment of the Court was now delivered by

RITCHIE, C. J. We were at first strongly impressed with the v that the jury had, in effect, established that there was a special very of the goods to the defendants to forward from St. John Halifax *en route* for England, not absolutely, or at all events, only on the defendants' effecting insurance, and that the defend-s, by receiving and transmitting them, undertook to effect such rance,—in fact that such receipt necessarily imported a pro-e to insure, and that, independent of the consideration to be d for their transport, the case fell within the ordinary rule that, en a party enters on the execution of an agency or undertaking, l fails to do what he undertakes to do, he is liable for malfeas-e, and that the defendants had no right to deal with the plain-s' goods but in the manner authorized by the plaintiffs' letter Mr. Stone—in other words that the terms of the letter became terms of the contract; and that, having transmitted them nsured, they were liable for neglect or breach of duty in dealing h the goods contrary to the contract. But a closer and more :ical examination of the evidence has led us to a different con-sion, viz.: that the contract was complete at Fredericton when plaintiffs delivered the goods to the defendants' agent there, l received the defendants' receipt therefor, which receipt con-ned, in our opinion, the terms on which the goods were received be transmitted to their destination, and so formed the contract ween the plaintiffs and defendants. No doubt the plaintiffs plied to Mr. Byrne to ascertain whether Mr. Stone would get m insured, and very possibly the reply of Mr. Byrne led him suppose that Mr. Stone would probably do so: but we can dis-er no contract on the part of the Company that he should do so. The letter sent by the plaintiffs to the agent in St. John can-, in our opinion, be considered in any other light than as a uest outside the contract, which possibly the plaintiffs had rea-able grounds for thinking would be complied with, but we fail discover sufficient to justify us in saying it formed any part of contract (and there is no assent or agreement by or on the part Mr. Stone himself to do what the letter asked, or on the part the Company that he would do so); or that there was any con-eration to found an agreement, or any agreement between the

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plaintiffs and defendants, making it obligatory on the latte insure. Nor was there anything in the letter, or otherwise, hibiting them from forwarding the goods unless insured. On contrary, had the defendants neglected to transmit the go agreeably to the terms of the receipt, or, rather, contract, and goods had been injured or destroyed by fire, or the plaintiffs l incurred loss by reason of the non-transmission, the defenda would certainly have been liable for the non-fulfilment of the c tract, in not transmitting as agreed, and could not set up, as answer, that Stone would not, or had not insured. The plainti no doubt, relied on Mr. Stone's complying with their request insure, as it would appear he had done on a previous occasion another party; and it may be that Mr. Stone, on receiving plaintiffs' letter, could, as a matter of accommodation to the pl tiffs, have complied with their request, and had the goods insu But, as we cannot arrive at the conclusion that insuring the gc formed, between the plaintiffs and defendants, a part of the c tract for their transmission, or that, outside of the contract for carriage of the goods, there was any valid or obligatory undertak on the part of either the defendants or Stone to effect the in ance, and an obligation on the defendants to not forward the gc unless insured, we think a nonsuit should be entered.

Rule absolute for entering a nonsui

1872.
April

IN THE ESTATE OF CHARLES W. STOCKTON, DECEASED.—*parte* ROACH.

Probate Court—When proctor a competent witness.

It is not a valid objection to a witness in the Probate Court that he appe as proctor for another person interested in the estate.

This was an appeal from the decision of the Probate Judge King's County, the ground of appeal being the rejection of evidence of A. A. Stockton, who was called as a witness by

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In re STOCKTON *Ex parte* ROACH.

petitioner, on application for probate of the will of the deceased, and also appeared as proctor for one of the heirs of the deceased.

D. S. *Kerr, Q. C.*, in support of the appeal.

C. *N. Skinner, Q. C., contra* cited *Shields v. McGrath.*[1]

RITCHIE, C. J. I entertain no doubt about this case. The mere fact that Mr. Stockton came into Court as proctor for another party, which Mr. Roach could not prevent, should not deprive him of the right to call him as a witness.

The reason which might exist at *Nisi Prius,* against the reception of the evidence of counsel, entirely fails here. I think Mr. Smith should have received the evidence. See *Ros. Ev.* ed. of 1872, p. 165.

ALLEN, J. I am of the same opinion. While I would not wish to say a word to encourage the practice of making counsel witnesses, I do not see how Mr. Roach could have prevented Mr. Stockton from acting as proctor for another. This case is very distinguishable from *Shields v. McGrath.*

WELDON and FISHER, J. J., concurred.

WETMORE, J. took no part.

Appeal allowed with costs to be paid by the party who raised the objection.

WALKER *v.* THE MAYOR &c. OF ST. JOHN.

1872. *February*

(This case was decided in Hilary, and should have been reported among the cases of that term.)

Bye-Law—Corporation limiting by contract their power to make.

The corporation of St. John being by Charter the conservators of the harbour, with power to regulate the navigation, anchoring and fastening of vessels, and to make bye-laws, etc., granted to the plaintiff the right to build a wharf extending into the harbour, and to receive the wharfage and emoluments to be derived from vessels lying at such wharf; the plaintiff built a wharf, and the Corporation afterwards passed a bye-law that no vessels should lie at that wharf with her bow to the South; in consequence of which the plaintiff lost the wharfage of a vessel.

Held, that the corporation had no right to limit by contract their powers to make bye-laws relative to matters within their control under the Charter, and that the plaintiff's grant must be taken subject to their right to make such bye-laws from time to time, as they should deem necessary for the anchorage of vessels.

[1] 3 Kerr 398.

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WALKER v. THE MAYOR ETC. OF ST. JOHN

This was an action on the case to recover damages for pre ing a vessel from lying at the plaintiff's wharf, whereby he the wharfage.

The question principally turned on the effect of a lease by the defendants to the plaintiff on the 12th August, 1868, w by, after reciting that the plaintiff had become assignee of ce lands, beach and flats, and the wharves and improvements the in the City of St. John, and that the defendants had agree grant them the privilege of building a wharf or pier in exte of the wharf then upon the property; it was witnessed that defendants thereby granted, bargained, sold, released and firmed to the plaintiff, his heirs and assigns, "the right and p lege to erect a wharf and pier in and upon all that piece of &c. (*describing it, and extending to the harbour line establishe the Act of Assembly* 27 *Vict. c.* 18) together with the right to demand and receive all wharfage, cranage, slippage and o emoluments to be derived from, or in respect to any ships or sels lying, loading or discharging at the west and north side the wharf and pier to be built and erected under and by virtu the said grant, or otherwise therefrom, together with all top wh age and charges which may at any time or times be legally re erable therefrom; and also all the right, title, interest, prop claim and demand of the said Mayor &c. of, in and to ground or flats covered with water, which the said wharf and or any part thereof may cover and occupy, together with all singular other the rights, members, privileges and appurtena to the same belonging, or in anywise appertaining:" Subjec a condition that the plaintiff should, within one year from date, build a substantial wharf over the whole space described keep the same in repair for ever thereafter, and subject to annual rent of $268.

After obtaining the lease, the plaintiff extended his w westerly to the harbour line defined by the Act, and other built it according to the conditions of the lease.

On the 26th May, 1869, the Corporation passed a Bye relating to the harbour of St. John, by which it was provided, no vessel should be anchored or moored in the harbour, near entrance of the Ferry slips on either side of the harbour, o

as to interfere with, or in any manner obstruct the passing of the Steam Ferry boats across the harbour; and that the Harbour Master should not moor, or permit to be moored, or placed at either of the wharves to the northward of the Ferry slip on the Eastern side of the harbour, known as "Johnston's Wharf," and "Walker's Wharf" any ship or vessel with her bow to the southward or down stream.

On the petition of the plaintiff, the latter clause of this bye-law, relating to the mooring of vessels at the wharves, was disallowed by the Governor in Council, under the Act 16 Vict. c. 37, § 38;[1] but before its disallowance, and very soon after it was passed, application was made to the plaintiff for permission to moor a vessel at his wharf for the purpose of discharging her cargo. The plaintiff gave permission, but the Harbour Master would only allow the vessel to be moored at the wharf with her bow up stream, according to the directions of the Bye-law, and as the owner of the vessel refused to place her there unless her bow was down stream, she was sent to another wharf, and the plaintiff lost the wharfage—$183. It appeared that a vessel belonging to the same owner had previously been moored at this wharf with her bow down stream; that she broke adrift during a gale of wind and a heavy freshet, and was considerably damaged; that, owing to the tides in the harbour, the risk of securing vessels at that wharf, with their bows down stream, was very great, and that there was comparatively no risk when they were lying the opposite way.

By the Charter of St. John, all the land and water, and the land covered with water, within certain limits (which included the harbour of St. John), were granted to the defendants, and the Common Council is made "the conservators of the water of the river, harbour and bay, with the sole power of amending and improving the said river, harbour and bay for the more convenient, safe and easy navigating, *anchoring,* riding and *fastening* the shipping resorting to the said City, and for the better regulating and ordering the same."[2] They have also full power and authority to make and establish laws and ordinances "for the public good, common profit, trade and better government of the said City, and for the better preserving, governing, disposing and letting of the

[1] 3 Local Stat. 194.

[2] 3 Local Stat. 998.

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lands, tenements and hereditaments to them belonging, and all other things and causes whatsoever touching or concerning the said City, or the state, right and interest of the same."[1]

The cause was tried at the St. John Circuit, before ALLEN, J. Verdict for the plaintiff. A rule *nisi* for a new trial having been obtained on—

April 12, 1872. *D. S. Kerr, Q. C.*, and *A. L. Palmer, Q. C.*, shewed cause, and cited *Pomfret v. Ricroft;*[2] 1 *Bl. Com.* 44. *Ang. and Am. Corp.* 229.

B. Lester Peters, Q. C., in support of the rule, cited *The Presbyterian Church v. The Mayor &c. of New York;*[3] *Stuyvesant v. The Mayor &c. of New York;*[4] *Gozler v. The Corporation of Georgetown;*[5] *Ang. & Am. Corp.* § § 262, 264, 265, 325, 333. *Coates v. Mayor &c. of New York.*[6]

Cur. Adv. Vult.

The judgment of the Court (ALLEN and FISHER, J. J.) was now delivered by

ALLEN, J. After stating the facts in the case, he continued:—I held at the trial, that the Bye-law was not *ultra vires,* and that the Common Council were the proper judges whether it was necessary or not for the safe navigation of vessels in the harbour. The only doubt I had, was whether the defendants were estopped by their lease from making such a Bye-law, and whether they could make any alteration in the mode of anchoring vessels differing from that which existed when they gave the lease, and thereby diminish the profits which the plaintiff was receiving from his wharf, and on that point I directed in favor of the plaintiff. That is substantially the only point in the case.

Several American cases were cited to shew that a Corporation could not limit their legislative powers by covenant, as it was contended the defendants had done in this case. Thus, in the case of *The Presbyterian Church v. The City of New York,*[7] the defendants had granted a lot of land in the City of New York to be

[1] 3 Local Stat. 995.
[2] 1 Saund. R. 323 *n.* (1).
[3] 5 Cowan 538.
[4] 7 Cowan 588.
[5] 6 Wheat. 593.
[6] 7 Cowan 585, 604.
[7] 5 Cowan 538.

used as a burying ground, covenanting for quiet enjoyment. Some years after, the Legislature of the State authorized the Corporation to make bye-laws regulating, or if necessary, preventing the interment of the dead within the City; and they did, in consequence, by a bye-law, forbid the land from being used as a burying ground: it was held that this did not constitute a breach of the covenant, but was an effectual legislative abrogation of it. This case was confirmed in *Stuyvesant v. The Mayor of New York*,[1] where a similar question arose on the same bye-law.

In *Gozler v. The Corporation of Georgetown*,[2] where the question was as to the powers of the Corporation being limited by a bye-law, the Court says: "The power of this body (Corporation) to make a contract which should so operate as to bind its legislative capacities forever thereafter, and disable it from enacting a bye-law which the Legislature enables it to enact, may well be questioned. We rather think that the Corporation cannot abridge its own legislative powers."

Now, although this case does not absolutely determine the point, the expression of an opinion upon it by the Supreme Court of the United States is entitled to very great weight. The cases from New York are expressly in point, and, though not binding upon us, we feel quite justified in following them, unless we believe them to be contrary to some principle of English law.

When the plaintiff in this case accepted the lease from the Corporation, he knew, or must be presumed to have known what the powers of the Corporation were in reference to the making of bye-laws, for the Charter is confirmed by the Act 26, Geo. 3, c. 46, and declared to be a public Act, of which all persons are to take notice.

It seems to us that the words of the lease do not bear the construction contended for by the plaintiff. There are no express words relating to the anchorage of vessels; but only the general words in the habendum "together with all and singular other the rights, privileges and appurtenances, &c." We think that a contract, the effect of which is to limit the powers of the Corporation to make bye-laws respecting matters within their control under the Charter, is beyond their powers as conservators of the

[1] 7 Cowan, 588.

[2] 6 Wheat. 593.

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harbour for the public benefit. They have no right to abandon any of their legislative powers, which they hold in trust for the benefit of the citizens.

If the plaintiff's contention is correct, the Common Council are precluded from making any change in the mode of anchoring vessels at the plaintiff's wharf, although, from the building of wharves in other parts of the harbour, or from natural causes, by the change of currents or deposits in the harbour, the general safety and security of vessels, or the navigation of the Ferry Boats, imperatively required that vessels lying at the plaintiff's wharf should only be moored in a particular manner. The Common Council are the judges of what is necessary and proper for the safety of vessels navigating or anchoring in the harbour, and the position in which they should be moored at the wharves. What may be a very suitable and proper regulation at one time, may, for various causes, be altogether insufficient and unsafe at another time. We therefore think the lease must be taken as subject to the right and power of the Corporation from time to time to make such bye-laws, regulating the anchorage of vessels, as they may think necessary for the due and proper navigation of the harbour; and, therefore, that the bye-law in question was not a derogation from any right granted to the plaintiff by the lease.

For these reasons, we think that the rule for a new trial must be made absolute.

Rule absolute for new trial.

NEWBURY *v.* YOUNG.

1872. April

Amendment—Adding Counts—Refusal—Master and Servant—Shipping Law—Master of Vessel—Negligence of Master—Liability of Registered Owner.

The registered owner of a vessel is not liable for goods lost by the fraud or negligence of the master during a voyage, unless the master is employed by, or acting for him. Therefore, where defendant made advances to A. to enable him to build a vessel, and took the registry in his own name to secure his debt; but the vessel was sailed by A.. and the defendant had no interest in her earnings, and did not employ the master.

Held, That he was not liable for goods lost through the negligence of the master.

The plaintiff having also recovered damages against the defendant for negligence of the master, whereby the cargo was detained, and plaintiff had to pay a sum of money to get possession of the cargo, a motion being made to enter a nonsuit on the ground that the defendant, as registered owner, was not liable, the Court refused to amend the declaration by adding a count, charging him with being the agent of the master, and wrongfully advising him to detain the cargo unless plaintiff paid him $496, and alleging that the defendant did detain the cargo till such money was paid, the object of such amendment being to retain the verdict for the amount so paid to defendant.

This was an action on the case against the defendant, as the registered owner of a Schooner, on which the plaintiff had shipped a quantity of flour from Montreal to Prince Edward Island, where the plaintiff resided. The plaintiff's case was that the Captain had deviated by going into the Port of Caraquet, by which the plaintiff lost the use of the cargo, the vessel having been frozen in, and the cargo not having been delivered until the next year, and was also put to expense, and compelled to pay and lay out a large sum of money. The defendant contended that, as registered owner, he was not liable for the negligence of the Master, there being no proof that the latter was employed by the defendant; it was shown that the defendant had made advances to the owners of the vessel to enable him to build, and had taken the registry in his own name to secure the debt. The cause was tried at the Gloucester Circuit in September, 1871, before ALLEN, J. Verdict for plaintiff. Pursuant to leave reserved, in the following Michaelmas term, *S. R. Thomson, Q. C.*, obtained a rule *nisi* to enter a nonsuit, citing *Ward v. Beck*;[1] *Hibbs v. Ross*;[2] *Frost v. Oliver*;[3] *Mitcheson v. Oliver*.[4]

On a subsequent day in the same term, *D. S. Kerr, Q. C.*, obtained a rule *nisi* for the defendant to shew cause why the plaintiff should not be allowed to add a count to the declaration, charging the defendant with being the agent and adviser of the Master of the vessel, and with advising and influencing him to detain the flour at Caraquet, and not to deliver the same to the plaintiff unless he paid to the defendant the sum of $496, and alleging that the defendant wrongfully detained the flour till the plaintiff was compelled to pay him that sum in order to get possession of it.

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[1] 16 C. B. N. S. 668.
[2] L. R. 1 Q. B. 534.
[3] 2 E. & B. 301.
[4] 5 E. & B. 419.

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April 18, 1872. *S. R. Thomson, Q. C.*, shewed cause agai the rule to amend the declaration, citing *Skeate v. Beale.*[1]

D. S. Kerr, Q. C., was heard in support of the rule and ci *Mast v. Goodson;*[2] *Govett v. Radnidge;*[3] 1 *Chit. Pl.* 153; *Ashm v. Wainwright;*[4] *Pasley v. Freeman.*[5]

D. S. Kerr, Q. C., shewed cause against the rule for enterin nonsuit.

S. R. Thomson, Q. C., who appeared to support the rule, w not called on.

The judgment of the Court was delivered by

ALLEN, J. The principal question in this case is, whether t registered owner of a vessel is liable for the negligence of t Master, without any proof that he was employed by such owne It was upon the ground of his being the registered owner, tl the plaintiff sought to make the defendant in this case liable; a if the case had rested upon the plaintiff's evidence, we shou have had no doubt as to what our decision should be; because t liability of the owner of a vessel in such a case, does not depe upon the fact of ownership, but on the principles of law applical to the case of master and servant; and whether the master w appointed by, or sanctioned by the owner, so as to make him l servant or agent: *Mitcheson v. Oliver.*[6]

In *Hibbs v. Ross,*[7] BLACKBURN, J., says, "The question rea is, whether the person sought to be charged, is the employer the Captain who made the contract, or the master of the pers who was guilty of the negligence; and the liability does r depend on the title to the ship," and, on page 543—speaking the registry—he says, "It is by no means conclusive. The sh may be demised (though that is very rarely the case), and t persons navigating her may be employed by the lessee, or by person who has purchased her, but not yet paid the price, ar consequently, not had the ship conveyed to him, as was the ca

[1] 11 A. & E. 988.
[2] Wm. Bl. 848.
[3] 3 Ea. 70.
[4] 2 Q. B. 846.
[5] 3 T. R. 53.
[6] 5 E. & B. 419.
[7] 1 Law R. Q. B. 542

in *Frost v. Oliver;* or, as in the most common case, they may be employed by one who is in fact a mortgagor in possession, though the mortgagee is registered as absolute owner."

This last alternative was precisely the position of the defendant in this case. He stated (and, according to the case of *Ward v. Beck,*[1] he had a right to shew) that he took the register of the vessel in his own name, for the purpose of securing a debt which Blanchard and Boudrot (the persons who built the vessel) owed him, and for further advances to enable them to finish her; that he had nothing to with the sailing of the vessel, nor with the appointment of the master, nor any interest in her earnings. The lease of the vessel, which he gave to Blanchard and Boudrot, at the nominal rent of $4 for the season of 1869, seems to us to be entirely consistent with such a state of facts; and the jury, upon a distinct question left to them, have found that the lease was *bona fide;* that the vessel was not being run for the benefit of the defendant; and that he was not in any way interested in her earnings. Upon such a finding, it is impossible to hold that the defendant can be made liable for the wrongful act of the Captain of the vessel, who was neither appointed by him, nor acting for him, and was not in any way his servant or agent.

The plaintiff, however, contends that, at all events, he is entitled to retain the verdict for $496—an amount paid to the defendant, under protest, in order to obtain possession of the flour; and an application was made to the Court, at the time the rule *nisi* was granted for entering a nonsuit, to amend the declaration, by adding a count charging the defendant with being the agent and adviser of the master of the vessel, and with wrongfully advising and influencing the master to detain the flour at Caraquet, and not to deliver the same to the plaintiff unless he paid to the defendant the sum of $496; and alleging that the defendant wrongfully detained the flour, till the plaintiff was compelled to pay him that sum in order to get possession of it.

The defendant's account of this transaction was, that, after the vessel was frozen in at Caraquet, he, acting for the Captain, sent for the Portwardens; that a survey was made of the vessel, and they recommended the flour to be discharged; that it was discharged,

[1] 13 C. B., N. S. 668.

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and placed in a store belonging to Wm. Young (defendant's brother), where it remained till April following; that Wm. Young claimed this sum of $496 for storage and expenses, and refused to give the flour up, until it was paid; and that, by his direction (he being, at the time, too ill to attend to it), the defendant received the money, and released the flour.

It was not claimed by the plaintiff at the trial, that the defendant received this money in any other character than as owner of the vessel, and it was only as such owner that the jury were directed that he was liable, and that the plaintiff might, and that he did recover it as part of his damages. The proposed amendment seeks to make the defendant liable in quite a different character—one in which different questions from what arose in this case would be involved, and in which the defendant might, or might not have a good defence; but that question has never been tried—the defendant has never had an opportunity of answering it, because it was not a matter of controversy on the trial. It would, therefore, be the greatest injustice to make the proposed amendment, and allow the verdict to stand for the $496.

The rule to amend the declaration must, therefore, be discharged with costs, and the rule for entering a nonsuit be made absolute.

Judgment accordingly.

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April

WIGGINS *v.* HENDRICKS.

Equity—Pleading—Practice—Amendment—Costs.

A Court of Equity has an inherent power to amend the pleadings in a cause and an amendment may be made *ex parte;* though ordinarily, notice should be given.

In this suit, which was for the foreclosure of a mortgage. the mortgage was particularly set out in the bill, and the land described as being in the Parish of H. (according to the mortgage): the bill was taken *pro confesso,* and the plaintiff, afterwards discovering that part of the land was in the Parish of N., obtained an *ex parte* order to amend the bill in the description of the situation of the land. The property was sold under the decree in February: the defendant knew of the advertisement and was present at the sale; and in May he applied to set aside the proceedings for irregularity.

Held, 1. That, the mortgage having been particularly set out in the bill, no amendment was necessary. 2. That, if the amendment was necessary, the defendant had not been prejudiced by it. 3. That if an amendment made *ex parte* was irregular, the defendant should have applied before the sale to set aside the order, and had waived the objection by his delay.

The appellant in this case having applied for costs, the application was refused there being no misconduct shewn on the part of the respondent.

In this suit, which was brought for the foreclosure of a mortgage, the mortgage was particularly set out in the Bill, and the land described as being in the Parish of Hampton (according to the mortgage). The bill was taken *pro confesso,* and a decree obtained for the sale of the mortgage premises. The plaintiff sold the property, as described in the mortgage, but no conveyance was given, the plaintiff having in the meantime discovered that a part of the premises lay in the Parish of Norton, and obtained an order vacating the decree and setting aside the sale. An *ex parte* application was then made to MR. JUSTICE WELDON, for leave to amend the Bill by adding the words, "situate and being partly in the Parish of Norton, and partly in the Parish of Hampton." The plaintiff then proceeded and obtained a second decree, under which the land was sold. This took place on the 18th February; the defendant knew of the advertisement and was present at the sale. The 26th May following, the defendant applied to MR. JUSTICE FISHER, sitting in Equity, to set aside the proceedings on the ground that the amendment of the plaintiff's Bill was improperly allowed. The learned Judge, being of the opinion that, after three months—the time limited by the Act 17 Vic. c. 18, for filing the Bill—the amendment should not have been made without notice to the opposite party, granted the application; and the plaintiff now appealed from this decision.

April 19, 1872. *S. R. Thomson, Q. C.,* and *W. Jack, Q. C.,* supported the appeal, and contended that an amendment could be made at any time without notice when there was no appearance; therefore the order was regular. But even if not, it was a mere irregularity, and the defendant, by delaying so long, had waived it. In coming to the Court to set aside an amendment, the party applying was bound to shew that injustce had been done him. The defendant saw by the notice in the Gazette that the plaintiff was proceeding, and he should at least have applied promptly, and had waived the irregularity, if there was any, by his laches. As to power to amend, see 2 *Rev. Stat.* 379, § 2.

D. S. Kerr, Q. C., for the respondent, contended that, as a Bill must be filed within three months of the time limited for appearance, it was manifestly illegal to allow an amendment to be made, after that time, which materially altered the bill. The provision in 2

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Rev. Stat., which had been cited, only referred to common law pı ceedings. The amendment was very important, involving, as did, all the land in the mortgage, which was situate in Nortı and which had not been advertised at all under the first decree.

RITCHIE, C. J. My opinion in this case is, that there was absolute necessity for any amendment; that the property havi been particularly described by metes and bounds and by referer to survey, &c., and the mortgage deed having been specially set c in the bill, the substance of the matter was sufficiently disclosed the bill as filed. That, if an amendment was necessary, the Coı had an inherent right to make it. That it was wholly disc: tionary, and, though I should (in accordance with my usı practice) not have granted it without notice or without requiri the order to be served, I do not think such an order, granted this was, should be interfered with unless the Court are satisfi the defendant has been damnified, which I think the facts befc the Court very clearly shew could not have been the case in this i stance. I also think the defendant was entirely too late in appl ing to rescind the order. He should have applied before the sa certainly not have lain by and allowed so many Courts to pı before applying to remedy the irregularity (assuming the want notice to have been an irregularity), and, therefore, I think the a peal should be allowed. The costs of a successful appeal will n be given in the absence of misconduct on the part of the respon ent.[1] Any departure from this rule is exceptional.

ALLEN, J. At most, I think the order for amendment w irregular and might be waived,—and I think it was waived by n applying in time to set it aside, and allowing the plaintiff to go (and sell. The defendant knew before the sale that the plaint was proceeding, and, if he intended to apply to set it aside, : should either have applied to a Judge to stay the sale, or to t: Court within a reasonable time after.

I am not clear that the amendment was necessary. The d defendant knew by the summons what the plaintiff was proceedi for—the amount he claimed &c., and the mortgage was correct

[1] The appellants' counsel applied for costs, citing *McKersey v. Ramsey*, 9 (& F. 818; *Older v. Young*, 8 M. & C. 317.

described in the bill. He could not possibly be misled by it. The plaintiff had a right to resort to all the land covered by that mortgage to obtain payment of his debt; and the defendant did not think he had any defence to that. How is he possibly injured by the amendment? If he had no defence to the bill originally, could he have any defence after it was amended?

It is not a new cause of action at all created by the amendment. Why set aside a proceeding which works no injury to the defendant, merely to increase expenses, when the plaintiff can proceed again and sell?

WELDON, J. I am of the same opinion. After looking carefully into the practice, I have come to the conclusion that an amendment can be made in a Court of Equity after three months. I think the "three months" only applies to the time of filing the bill. Amendments are often made in Courts of Equity from time to time. My general practice is to have the other party served, but I did not consider this a very material amendment, as all parties knew the locality of the land. I think the appeal must be sustained.

WETMORE, J. I quite agree. I was astonished to hear the limit put on the power of a Court of Equity to amend: I think it co-extensive with the exigencies of equity. As to the amendment, a decree may be amended after being filed; and why not a bill as well?

FISHER, J. I was of opinion that an amendment should not be made after three months, under the Act, without notice to the other party; but I never intended to limit the power of the Court to amend.

Appeal allowed without costs.

BETTS, ASSIGNEE, &c., *v.* McGOWAN *et al.*

1872.
April

Replevin Bond—Staying Proceedings—Power of Judge—Damages

The provision in the Act 4 Wm., 4. c. 38, authorizing the Court to give relief in actions on Replevin Bonds, having been omitted from the Act 13, Vic., c. 53, which repealed the former Act, a judge has no power, except under special circumstances, to stay proceedings in such an action, where it is brought for the breach of the condition of the bond to prosecute the replevin suit without delay, and the Plaintiff's proceedings are regular. The Court will not enquire whether the Defendant in the Replevin suit has, or has not sustained damage by the breach of the bond.

1872.

BETTS v. McGOWEN.

Tuck, Q. C., in Hilary Term last, moved to set aside an order made at Chambers by MR. JUSTICE WELDON, staying proceedings in an action brought against the defendant on a Replevin bond.

S. R. Thomson, Q. C., contra.

Tuck, Q. C., in reply.

Cur. Adv. Vult.

The judment of the Court was now delivered by

RITCHIE, C. J. Has the Court or a judge any power to grant relief or stay proceedings, simply because the action is on a replevin bond, unless given by Statute? This power the Court once possessed in this province under the 50 Geo. III, cap. 21, and it is given in the same words as were used in the English Statute 19, Geo. II, c. 19, sec. 23. The section of the Act giving this power was repealed by 4 Wm. IV, c. 38, and, though other provisions as to replevin bonds were made, this power was re-enacted in the same words. The Act 13 Vic. c. 53, repeals these Statutes, consolidating all previous acts relating to replevin, and omitting this clause, and the Revised Statutes, Vol. I, repeals this Act, and chapter 126, in substitution thereof, "Of landlord and tenant and replevin," likewise contains no authority for the Court to grant relief on replevin bonds. We have, then, no statutory authority to warrant our interference in the case; and what right have we at common law to interfere? The Legislature has required a bond to be given and has fixed the condition. Must we not assume, if that condition is broken, there is, or may be, a substantial cause of action? *Steen v. Hanson*[1] shews, under circumstances by no means dissimilar to the present, that there was a breach of the replevin bond to prosecute without delay. What right have we to stay regular proceedings, and prevent the persons entitled to avail themselves of such breach, from trying their right, and proceeding in due course of law on the bond for such breach of its condition? We cannot undertake to say no damages have resulted from such breach, and, if we could, we have no right to adjudicate in a summary manner on the subject. No doubt this Court has a control

[1] 4 Allen 457.

ling power over the proceedings in suits in progress: but this can only be exercised when special circumstances arise to warrant interference. The Legislature having at one time given the Court a peculiar power over suits on replevin bonds, and subsequently withdrawn it, leaves such suits to be governed by the usual practice in ordinary cases.

Order Rescinded.

END OF EASTER TERM, 1872

CASES DETERMINED

BY THE

SUPREME COURT OF NEW BRUNSWI

IN

TRINITY TERM, XXXV VICTORIA

REGINA *v.* SIMMONS *et al.*

1872.
June

Justice of the Peace—One Justice issuing summons—Pe
before two—Interest—Disqualification—Certiorari—
Affidavits—When may be used.

One Justice may issue the summons on a complaint under the Act, 33 Vic.
though the penalty is recoverable before two Justices.
If the Justice is interested in the prosecution, as where he was a member
Division of the Sons of Temperance, by which a prosecution for selling
was carried on, he is incompetent to try the cause, and a conviction befor
is bad.
After the return of a *certiorari*, affidavits may be used to show want of jur
tion in the Justices, where that fact does not appear on the return.

In the preceding Hilary term, *Rainsford* having obtained a
nisi to quash the conviction of one John McGowan for se
liquor without license,

April 22. *Gregory* shewed cause.

Rainsford, in support of the rule.

The facts of the case are sufficiently stated in the judgment

Cur. Adv. Vu

The judgment of the Court (ALLEN, WELDON, FISHER,
WETMORE, JJ.) was now delivered by

ALLEN, J. This was an application to quash a convictio
John McGowan, made on the 26th July last, for selling li

without license, on the 6th day of June last, before the defendants, two Justices of the Peace for the County of Sunbury, on the following grounds:—

1st. That the summons was improperly issued by one Justice.

2nd. That Simmons, one of the Justices, was interested, being a member of the Division of the Sons of Temperance at whose instance the prosecution was carried on.

3rd. That the conviction did not state to whom the liquor was sold.

4th. That the Justices had no right to order the fine to be levied by distress, nor to award imprisonment for the costs of distress warrant.

5th. That the Justices had no right to adjudge, that McGowan be imprisoned for a certain time, unless the fine and costs imposed by the conviction be sooner paid: that the punishment by imprisonment was absolute, without any alternative.

As to the first point—McGowan appeared by attorney at the hearing, and thereby waived any objection that there might have been to the summons: 1 Rev. Stat. c. 158, § 1; *Reg. v. Shaw.*[1] But, in addition to this, we think a summons issued by one Justice was sufficient. The 1 Rev. Stat. c. 138, § 21, which regulates proceedings on summary convictions, declares, that "in all summary proceedings before a Justice upon any information, he may receive such information, grant a summons or warrant thereon, issue a summons or warrant for any witness, and do all other necessary act preliminary and subsequent to the hearing, even in cases where by the act or statute, the information must be heard and determined by two or more Justices." We see nothing in the Act 33 Vict. c. 23, under which this conviction was made, to alter that general provision in the act regulating summary convictions. We think there is no substantial distinction between the words—"to be recovered" before any two Justices, used in the Act 33 Vict. and the words "heard and determined," in the Summary Conviction Act. The whole of the proceedings, subsequent to the

[1] 11 Jur. N. S. 415.

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REGINA v. SIMMONS.

issuing of the summons, were before two Justices, and that sufficient.

2nd. As to the interest of the Justice. It appears by th evidence returned with the *certiorari*, that one T. L. Simmor was examined as a witness, and stated on cross-examination, th he was a Son of Temperance; that his brother was a Son c Temperance, and that the prosecutor was a Son of Temperanc that they all belonged to the same Division, and that the Divisic had taken part in the proceedings against McGowan. Thei was no direct evidence to shew that the witness, Simmons, wa the brother of the Justice; but, at the close of the evidence, M Gowan's attorney asked to have the case dismissed on the groun among others, that Mr. Simmons, the Justice, being a member c the Division of the Sons of Temperance, by whom the prosecutio was carried on, was incompetent to try the case. The fact of h connexion with the Sons of Temperance does not appear to ha been disputed, and, therefore, we think it may be taken as admitte at the trial. See *ex parte Dunlop.*[1] But, if there should be ar doubt on that point, the fact is stated in the affidavit on which tl *certiorari* was granted, and has not been denied.

In general, after a *certiorari* returned, the Court does not tal notice of anything but what appears by the return; but affidavi may be used to shew a want of jurisdiction: *Reg. v. Bolton Thompson v. Ingham.*[3] It being undisputed here, that Justic Simmons was a member of the Division of the Sons of Temperanc by which the prosecution, against McGowan, was carried on, he wa virtually one of the complainants, and was clearly incompetent t take any part in the proceedings, and consequently, the convictic is bad. It is a principle of jurisprudence that no one should a as a Judge upon an inquiry in which he is interested. It is in portant to the pure administration of justice, that the acts an motives of Judges should be above the reach of suspicion. N only should persons interested in a decision abstain from takin part in it, but they should also avoid giving any ground for tl belief that they influence others in arriving at a decision. *Re*

[1] 3 Allen 281.
[2] 1 Q. B. 66.
[3] 14 Q. B. 718.

v. Sheriff of Warwickshire;[1] *Reg. v. Justices of Suffolk;*[2] *Reg. v. Justices of Tyrone;*[3] *Reg. v. Allen.*[4]

As the conviction must be quashed on this ground, it is unnecessary to consider the other objections.

Rule absolute to quash the conviction.

THE QUEEN *v.* THE COMMISSIONER OF SEWERS FOR HOPEWELL.

1872.
June

Commissioners—Swearing in of—Assessment without—Effect.

By 1 Rev. Stat. c. 17, Commissioners of Sewers shall be sworn into office within one week after their election, or shall be deemed to have refused. Held, That the Act was imperative, and that a Commissioner elected on the 2nd August could not be legally sworn in on the 8th September—the office at that time being vacant; and that his joining with the other Commissioners in making an assessment rendered it void.

Semble, That if an objection is made to a proposed assessment by the Commissioners of Sewers and some of the proprietors of lands in the District give an undertaking to the Commissioners to indemnify them against all damages and costs in case they make the assessment, and they afterwards proceed with it, the assessment will be set aside.

In Hilary term last, *Fraser* obtained a rule *nisi* to quash an assessment made by the Commissioners of Sewers for the Parish of Hopewell, Albert County, on the grounds (*inter alia*) that one of the Commissioners was not sworn in within a week (the time required by the Act) and that the Commissioners were indemnified by some o fthe proprietors.

April 23. *A. L. Palmer, Q. C.*, shewed cause.

Fraser, in support of the rule.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

ALLEN, J. We think it is impossible to get over the objection that Michael Keiver, one of the Commissioners who took part in the assessment, was not qualified to act.

The law providing for the election of Commissioners in the several districts declares (1 Rev. Stat. c. 67, § 17) that "the

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[1] 30 Law & Eq. 223.
[2] 18 Q. B. 416.
[3] 12 Irish C. Law R. 91.
[4] 10 Jur. N. S. 796; 4 B. & S. 915.

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THE QUEEN v. COMMISSIONERS OF SEWERS FOR HOPEWELL.

Commissioners elected shall be sworn to the faithful performance of their duties as such by the presiding officer at the election, or by any Justice, within one week after his election, or he shall be deemed to have refused the office." By Section 22, "When a vacancy occurs by the refusal, removal or death of any Commissioner, it shall be filled up in the manner prescribed in chapter 68, of this Title."

Keiver was elected on the 2nd August, 1869, but was not sworn in till the 8th September following: at that time, the office was vacant, for the law had declared that he had refused to accept it; therefore he had no right to be sworn in, and the fact of his having been sworn, gave him no more authority than if he had never been elected. To construe the Act as only directory in this particular, would ignore the plain and unequivocal language of the Legislature, which we are bound to give effect to, though it may lead to inconvenience. In *Abley v. Dale*,[1] JERVIS, C. J., says, "If the precise words used are plain and unambiguous in our judgment, we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice."

Had Keiver taken no part in the proceedings, it may be that the acts of the other Commissioners would have been good, under the provisions of Cap. 161, § 3, of the Rev. Statutes; but here, he has acted throughout as a Commissioner; and we think his doing so has vitiated the assessment.

In this view of the matter, it is unnecessary to consider the other objections: we may state, however, that on one of them, at least—that of the indemnity of the Commissioners by certain of the proprietors of the marsh—we have formed a strong opinion. In *Selwood v. Mount*,[2] ALDERSON, B., says, "Magistrates ought not, I think, to take an indemnity. It is a bad practice, as it has the effect of enabling them more safely to decide in favor of a party who is able to give an indemnity, than of one who cannot do so." This language will apply with equal force to all other persons acting in a judicial capacity.

The rule for quashing the assessment must be made absolute.

Rule absolute.

[1] 11 C. B. 391.

[2] 9 C. & P. 7d.

THE MINAS INSURANCE COMPANY *v.* RIVERS.

1 J.

In this action, which was on a promissory note, alleged to be payable on demand, the note offered in evidence was payable twelve months after date; the plaintiff having applied to amend, the defendant asked for time till the next day to obtain the affidavit of the real defendant. The Judge refused this, but offered to allow the defendant about half an hour for the purpose, which he declined, and the amendment was accordingly made. The Court refused to interfere with the Judge's decision,—it appearing that there was but one note between the parties, that the defendant had seen it in the hands of the plaintiff's attorney after the action was brought and had promised to pay it, but afterwards refused to do so.

Assumpsit, tried before FISHER, J., at the St. John Circuit in August, 1871, when a verdict was entered for the plaintiff. In the following Michaelmas term, *C. W. Weldon* obtained a rule *nisi* for a new trial, the principal ground being that the learned Judge was wrong in allowing the plaintiff to amend his declaration by substituting a note payable in twelve months for one payable on demand.

April 16, 1872. *Tuck, Q. C.,* shewed cause.

C. W. Weldon, in support of the rule.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C. J. In this case it appears from the affidavit of Mr. Tuck, the plaintiff's attorney used on shewing cause that, after he had written the defendant requesting payment of the note in question in this action, the defendant called upon Mr. Tuck and saw and read the note and said he would make some inquiries before payment; that a few days afterwards the defendant again called at Mr. Tuck's office and promised to pay the note—but subsequently declined paying on the ground, as stated in Mr. Tuck's affidavit, that Mr. Pomares had requested him not to pay.

On the argument, it was admitted that the defendant was in Court when the amendment complained of was made. He did not make an affidavit in resisting the application to amend, nor has he since made any. It clearly appears that he knew perfectly well upon what note the action was brought, he having previously inspected and promised to pay the note in Mr. Tuck's office. We do not see any reason why the discretion of the learned Judge in ordering the amendment on the trial should be interfered with.

Rule discharged

1872.
June

AITON v. DEMILL.

Crown Grant—Extending boundaries by Crown after grant.

The Crown may by a subsequent grant extend the boundaries of a former grant beyond the distance mentioned therein, so far as relates to the rights of the parties claiming under the respective grants, *inter se*, though the Crown may not be estopped thereby as against the grantee in the first grant.

This was an action of trespass brought by the plaintiff for cutting timber on the rear of his lot, in which a contingent verdict was entered for $15 damages, it being agreed at the trial that the Court should decide the case, if necessary, as a jury might do.

A rule *nisi* for a new trial having been obtained at a previous term—

April 19. *A. L. Palmer, Q. C.*, shewed cause, citing *Carpenter v. Butler.*[1]

S. R. Thomson, Q. C., in support of the rule, cited *Gaudin v. McKilligan.*[2]

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C. J. The plaintiff claims under a grant from the Crown to Robert and Elizabeth Smith, dated
It is clear that the land in dispute does not fall within the bounds of that grant, but is in the rear or west of it, and at the time it issued, was vacant Crown land.

On the 14th January, 1861, the Crown granted a lot of land to Robert Payne, described as follows:—"Beginning at a post standing at the northeast angle of lot No. 2, in block 4, west of Pollett River; thence south 2° west 50 chains, to a birch tree standing in the southeast angle of said lot; thence south 88° east 5 chains to another post standing on the western line of Michael Gowland's purchase; thence along that line, north 26 chains to a birch tree standing in the northwestern angle of said purchase; thence along the northern line thereof, east 21 chains, 50 links to a beech tree standing in the northeastern angle of said

[1] 8 M. & W. 209. [2] 2 All. 392.

purchase; thence along the eastern line thereof south 15 chains to meet the northern line of the grant to Robert and Elizabeth Smith; thence along that line south 86° 30m east, 15 chains; thence north 2°, east 39 chains to a beech tree standing on the southern side of a reserved road; and thence along the said side of that road north 88°, west 40 chains to the place of beginning."

On the 21st January, 1861, the Crown granted to Michael Gowland the lot referred to in the above mentioned grant as "Gowland's purchase," in the following words:—"Beginning at a fir tree standing in the northwestern angle of the grant to John Gildert Jr., on the west side of Pollett River; thence north, 50 chains to a birch tree; thence east 21 chains 50 links to a beech tree standing in the prolongation of the western line of lots Nos. one and two, granted to Robert Smith and Elizabeth Smith; thence along the said prolongation and western line of the said last mentioned grants south, 1° 30m west, 51 chains, crossing a small brook, to a post standing in the southwestern angle of lot number two, granted to Elizabeth Smith; thence along the northern line of the above mentioned grant to John Gildert, north 88° 30m west 20 chains, again crossing the aforesaid brook, to the place of beginning."

Each of these grants refers to a plan annexed, upon which the Gowland grant is represented as bounded on the western line of the Smith grant. It is evident from the reference in these grants to particular trees, as standing at the various angles, that they were based upon actual surveys of the land; and it is impossible not to avoid the conclusion that the Crown intended that the eastern side line of the Gowland grant and the rear line of the Smith grant should be one and the same. The Payne grant and the Gowland grant could not be run out, (giving full effect to their descriptions,) without so extending the Smith grant. Both those grants recognise, as the rear line of the Smith grant, a line which would throw the *locus in quo* within that grant, thereby extending the side lines thereof about fifteen chains beyond the distance specified therein. The Payne grant is expressly declared to be bounded by such extension of the northern line of the Smith grant, and the eastern side line of the Gowland grant is declared to run along the rear or western line of the Smith grant, so extended, to

1872.
AITON v. DEMILL.

a post standing at the southwest angle of one of the lots in that grant.

The defendant claimed the right to cut timber on the fifteen chains, (the extension of the Smith grant) under the authority of one Killam, the owner of the Gowland grant.

The question is not now whether the Crown would be estopped from hereafter disputing the correctness of the rear line of the Smith grant, as recognized by the other grants; or, whether if admitted in the Letters Patent under a misapprehension, it might not be in the power of the Crown to correct the error; or, how far the Crown would be estopped as against the Smith grants, it is not necessary to enquire. But in the absence of any assertion of right to the land between the two lines, or repudiation of the line on the part of the Crown, and as between the grantees and their assigns under these respective grants, it must be considered that the Crown has established this line, as now claimed by the plaintiff as the line dividing the Gowland lot from the Smith lot, and as the Crown has by Letters Patent declared and established the rear line of the Smith lot, at a time when the title to the land was in the Crown, the owner of the Smith lot has a right to hold up to that line against all others. And it certainly is not in the mouth of those claiming under the Gowland grant to ignore the line of their own grant, and claim, against the owners of the Smith lot, that the land lying in the rear of those lots was not within the bounds of that grant, when the Crown, owning the land, solemnly declares it is.

Rule for a new trial discharged, and order made that verdict stand for $15.

GARRISON *v.* HARDING.

1872.
June

Trespass—False imprisonment—Information—Omission of Christian name—Subsequent insertion.

An information was sworn before the defendant, a Justice of the Peace, of the commission of an alleged offence by ——— Garrison, (the Christian name being omitted); the defendant afterwards filled in the plaintiff's Christian name, and issued a warrant against him, on which he was arrested. Held, that the warrant was void, and the defendant liable in trespass.

This was an action for false imprisonment, the facts of which are sufficiently stated in the judgment of the Court. At the trial a verdict was entered for the plaintiff for $25. A rule *nisi* for a new trial having been obtained at a previous term, on—

April 16. *Rainsford* shewed cause.

Needham, in support of the rule.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

ALLEN, J. This was an action for false imprisonment.

The plaintiff was arrested under a warrant issued by the defendant, a Justice of the Peace for the County of Carleton, on a charge of firing a pistol in the highway, contrary to a by-law of the municipality of the County. It appeared that the plaintiff was driving on the highway, followed by his dog; that a larger dog belonging to the defendant ran out and attacked the plaintiff's dog, throwing him down twice, and that on the second attack, the plaintiff fired a pistol at the larger dog, and wounded him. Shortly after this, the defendant took an information against the plaintiff for having fired a pistol in the highway, and issued a warrant upon it. After the plaintiff was arrested, and while he was in custody of the constable, he met the defendant in the street in Woodstock, and they had some conversation about the shooting of the dog—and the defendant's right to issue the warrant—the plaintiff saying that he had not violated the law to his knowledge, but if he had, he was willing to do what was right; and that if the defendant's dog died, he would pay for him. He was afterwards taken into a room where the defendant was, and, (according to his own evidence) he told the defendant he was willing to enter into bail before any other Jnstiee to appear and answer the charge, and wished to be allowed to go to some Justice, in charge of the constable, for that purpose; but that the defendant refused to allow him to do so, and directed the constable to take him to gaol. He was taken to gaol under a warrant remanding him for two days, and kept there about an hour, when he was discharged by the defendant's direction, on payment of the constable's and

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GARRISON v. HARDING.

gaoler's fees. The defendant and the constable denied that there had been any refusal to allow the plaintiff to enter bail before another Justice; but the jury found in favor of the plaintiff on this question.

It is immaterial to consider any of the objections taken to the finding of the jury on this point; as we think the warrant, under which the plaintiff was arrested, was illegal, and therefore amounted to no justification to the defendant.

It appeared that when the information was sworn to, a blank was left in it for the plaintiff's christian name, and that the defendant afterwards filled in the name "William," and issued the warrant. This was an unauthorized proceeding, which destroyed the information. Without a proper information under oath, the defendant had no right to issue the warrant: the information is the foundation of the Justice's jurisdiction, and the basis of his subsequent proceedings. Here, there never was any sworn information against William Garrison, and consequently nothing to authorise the issuing of a warrant against him by that name: the warrant was therefore void, and the defendant a trespasser, irrespective of any question about his refusing to allow the plaintiff to enter bail. In such a case, it is not necessary to allege, or prove, malice.

We cannot abstain from remarking upon the impropriety of the defendant's conduct in this matter. Though, ostensibly, the prosecution was for the violation of a by-law of the Municipality, the real object of it was, evidently, to punish the plaintiff for shooting the defendant's dog: he therefore, under the circumstances, should have left it to some other Justice to vindicate the alleged breach of the law, and should not have attempted to act judicially in a matter in which he was substantially the prosecutor, and where he could not act with impartiality.

The verdict must stand; and, under the circumstances, we think the defendant has escaped with very small damages.

Rule discharged.

1872.
June

HERBERT *v.* HANINGTON.

Election petition—Costs—Counsel fee.

The costs of the trial of an election petition are to be taxed, as near as may be, according to the scale of costs in actions at law; and no greater sum can be taxed for the counsel fees than is allowed by the Ordinance of Fees; therefore a Judge has no power to tax a higher counsel fee than five guineas on the trial of a cause under the Bribery and Corruption and Election Petition Act, 1869.

This was an election petition under "The Bribery and Corruption and Election Petition Act, 1869." The defendant having been unseated, the Judge, acting under the authority of Sections 61 and 62 of the Act, made an order declaring (*inter alia*) that the plaintiff should be taxed and allowed seventy guineas counsel fees on the trial of the petition.

April 17. *A. L. Palmer, Q. C.*, moved to rescind this order.

W. J. Gilbert and *Morrison, contra.*

Palmer, Q. C., in reply.

Cur. Adv. Vult.

The judgment of the Court (RITCHIE, C. J., and ALLEN, WELDON and FISHER, JJ.) was now delivered by

RITCHIE, C. J. We think the order for the taxation of the costs in this case must be rescinded. Looking at the various provisions of "The Bribery and Corruption and Election Petition Act, 1869,"—it is evident that the trial of an election petition is intended to be as near as may be in the nature of an action at law, and a trial at a Circuit Court—the fees to witnesses are to be according to the scale allowed to witnesses on trials at *Nisi Prius*; and, as the costs are to be taxed by the Clerk of the Pleas, and no power is given to the Judge by the Act to tax counsel fees, we think we ought not to go beyond the scale of fees allowed by the ordinance in actions at law. No doubt the counsel fee allowed on trials at law may, in ordinary cases of election petitions, be very inadequate. It is often so in trials at law; but, without a mode of taxation being established to enable us to exceed the recognized scale, we think the latter must be adhered to until expressly altered.

Order rescinded.

1872.
June

DOE D. JOHNSTON *v.* JARDINE.

Dower—View—Assignment Particulars—21 Vic. c. 25.

In an action of ejectment for Dower, under the Act 21, Vic. c. 35, there must be a view of the premises, and if the plaintiff recovers, the dower must be assigned by the jury in giving their verdict. The declaration may be substantially the same in form as in an ordinary action of ejectment, and the defendant if necessary may obtain particulars of the plaintiff's claim.

Ejectment to recover dower claimed by the lessor of the plaintiff, in land in St. John, belonging to her late husband. The action was brought under the Act 21 Vic. c. 25. A verdict having been found for the plaintiff, a rule *nisi* for a new trial was subsequently obtained on the following grounds: 1. That dower could not be recovered under the Act 21 Vic. c. 25—the Legislature not having provided the requisite machinery for carrying through the action. 2. That, even if it could be so recovered there not having, in the present case, been a jury of view as required by the Act, the verdict could not stand.

April 25. *D. S. Kerr, Q. C.,* shewed cause.

W. Jack, Q. C., in support of the rule.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C. J. Ejectment, before the Act 21, Vic. c. 35, did not lie for dower which had not been assigned, this Act being passed to enable dower to be assigned and recovered in the same action; and to remove the great disadvantages spoken of by Lord Coke[1] which the wife had, namely, that she could not enter into her dower by the common law, but was driven to her *writ* of dower to recover the same; and we can see no insuperable difficulty in the way to prevent the carrying out of the act in all cases where, before its passage, dower could, after assignment, have been recovered in ejectment; or anything to exact or require any change in the form of the action of ejectment, the fictitious character of which is not altered in any manner, or done away with. Nor can we discover that a defendant is at all more embarrassed as to the nature of the claim against him than in a

[1] 1 Inst. 32 (*b*).

ordinary action of ejectment. If, on being served with the declaration, he is ignorant of or in doubt as to the nature of the claim, there is nothing, that we are aware of, to prevent him from obtaining, in due and regular course, the necessary particulars to enable him to understand exactly for what the action is brought.

The view provided for by section 2 is, in our opinion, intended to enable the jury, from a personal inspection of the premises, the better to understand and apply the evidence, and assign, with sufficient certainty the dower if the right to dower shall be established, after a view and return, as provided for in the Act. And the viewers having attended, they are to be duly sworn as jurors, and the right to dower and arrears is to be tried, and, on such trial, if the jury find the plaintiff entitled to dower, and sufficient evidence is offered to enable them, with the aid of their own personal inspection, to assign the dower with such certainty as will enable the Sheriff to put the claimant into actual possession, they shall by their verdict assign it; and if the plaintiff is entitled to arrears, assess the amount, and, for the dower so assigned and arrears, judgment shall be entered, and execution shall issue to recover possession of the dower so assigned and the arrears, if any. If the plaintiff fails to establish her right to dower or arrears, or does not offer sufficient evidence to enable the jury to assign the dower with their inquisition, certainly her suit will necessarily fail for want of proof, as in any other case where there is a deficiency of evidence. There may be cases where, in the course of the trial, from the nature of the evidence, further views may be necessary. If such a case should arise, the power given by the 18 Vic. cap. 24, sec. 17, (to the judge) will meet all such difficulties.

Rule absolute for new trial.

HARRIS *v.* ROULSTON.

1872.
June

Apprentice—Indenture—Imprisonment.

The Provisions of the Rev. Stat. c. 134, § 6, apply to all indentures whether the apprentice is above or under fourteen years of age, and unless the requisites of that Section are complied with, the apprentice is not liable to imprisonment by Justices under the 15th Section of the Act.

1872.

HARRIS v. ROULSTON.

This was a special case stated for the opinion of the Court by order of a Judge. The defendant when under age, was bound before a Justice of the Peace to the plaintiff as an apprentice, by Indenture, dated the 15th March, 1867, to learn the art, trade or mystery of a moulder, and after the manner of an apprentice to serve for and during and unto the full end and term of five years from the 11th day of September, 1866. After providing for the faithful service of the apprentice, the Indenture stated: "and the said Master shall use the utmost of his endeavours to teach or cause to be taught or instructed the said apprentice in the art, trade, or mystery of a moulder. And during the said term of five years to pay the said Robert Roulston, in lieu of boarding, washing and apparel, the sum of eighty dollars for the first year, &c. ——"

No provision was made for teaching the apprentice to read and write, &c., as required by Rev. Stat. c. 134, § 6.

The contention of the defendant was that this Indenture was not binding on him, because the provisions of said § 6 were not sufficiently complied with; while the plaintiff's contention was that such provision was sufficiently complied with, or, if it were not, such non-compliance did not make the Indenture void, the Act being in that respect only directory.

The question for the opinion of the Court was, whether the defendant was liable to be committed to gaol under the 15th Section, for absenting himself from service—if so, the verdict to be for the plaintiff; if not, then for the defendant.

April 17. *A. L. Palmer, Q. C.*, for the plaintiff.

C. N. Skinner, Q. C., for the defendant.

Palmer, Q. C., in reply.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C. J. It was argued in this case that the provisions of the 6th section referred only to children under fourteen years of age. It does not appear by the special case, whether the apprentice, Roulston, was under or over 14 years of age, the case simply stating that when under age he was bound; but it was

argued upon the assumption that the apprentice was over fourteen and that so much of the 6th sec. as applied to the provision to be made in every indenture for teaching children to read and write and to cypher as far as the rule of three, and for religious and other instruction (which is wholly omitted in the indenture) did not apply to children above 14 years of age, and (it must also be contended) that the benefit and allowance to the minor for medical attendance is equally inapplicable to children over 14 years, inasmuch as there is an absence also of this provision from the Indenture; or, if one or other or both were applicable, then so much of the Section not applicable to these points was only directory.

The obvious principle upon which the Legislature legislates in cases of this kind is one of public policy for the protection of apprentices on the one hand, and for enabling masters to enforce the contract of apprenticeship by summary proceedings on the other; to accomplish which it makes, as it were, a statutory contract which it requires the parties to enter into if the child minor is to be bound on the one hand, or the master to have the summary remedy on the other. The first Section of the 134th Chapter of the Revised Statutes, declares how "children under the age of 14 years of age may be bound until that age," and the second Section declares that "persons, above the age of 14, not having parents or guardians competent to act," may be bound in the same manner.

The only difference of the binding of "children" under 14 and minors" above 14 is that the consent of the latter shall be expressed" in the Indenture, and testified by their signing the same." Secs. 3 and 4 say, no minor shall be bound "unless, ;" but the provisions are equally applicable to cases under ction one or two. Sec. 5 provides that the overseers of the r may bind as apprentices "the children of any poor person has become chargeable to the Parish, and children whose nts are dead, who have become chargeable themselves, whether are under or above the age of 14," no consent being required. comes Sec. 6, in these words—"Provision shall be made in Indenture for teaching children to read and write and to r as far as the rule of three, and for religious and other inions, and such other benefit and allowance to the minor as

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may be agreed upon, and in case of sickness, for medical atten ance, board and care." Does not this Section apply to Sec. 5, t children to be bound under that Section being those whom would be the especial duty of the Legislature to see properly p vided for and protected? If so, it must apply to children abo as well as under 14 years, the children referred to in that secti being expressly declared to be all children "whether they a under or above 14 years, and so the term "minor" and "chil ren" in sec. 6 must have been used as equivalent terms. A do not, for the same reasons, sections three and four equally app to sec. 5? The statute says no minor shall be bound unless by Indenture, &c. Must not this be such an Indenture as provided for by the Act, and must not the words of the 6th sec "Provision shall be made in every Indenture," necessarily be re as meaning every Indenture under the Act? Can it be said th one requirement of the Act is merely directory and another i perative? If one can be omitted, why not another? And if a is omitted, is not the apprentice sought to be bound by a differe instrument than that provided by the Legislature for his prot tion, and so the whole effect of the Act is destroyed by the taki from the apprentice the Statutory contract the Legislature has pressly provided on his behalf? Teaching to read, write a cypher as far as the rule of three, and religious and other instr tion may be quite as necessary for a child or minor above 14 ye of age as for a child or minor under that age. Equally so, case of sickness, might the apprentice—over fourteen—requ medical attendance, in relation to which the Indenture is deficie

It may be in this case that the apprentice had been thoroug taught to read, write and cypher and had received thorough ligious and other instruction, but on this subject the case is silen nor do we think, had it been stated one way or the other, it shou affect our judgment. The Indenture should contain all the pr visions required by the Legislature, and whether the condition have been performed, or sufficient excuse for non-performanc exists, this matter is proper to be investigated and determined b the two Justices to whom any apprentice may apply, complainin of the non-performance of the agreement. Though in this vie of the case the master has not the summary remedy against th

apprentice, for absenting himself from his service provided for by the Act, it by no means follows that he may not recover an indemnity for a breach of the agreement in the bond mentioned in the case, taken by him for securing the performance of the agreement.

Judgment for defendant.

DOE D. SULLIVAN *et al.* *v.* CURREY.

1872.
June

Deed under sale by license of Probate Court—Objection to proceedings in Probate Court—Remedy by appeal—Irregularity of proceedings—Sufficiency of personal property—Effect on deed.

The lessors of the plaintiff claimed as devisees under the Will of H. P.; the defendant claimed under a deed from H. P's executor, under a license from the Probate Court. The plaintiff contended that the license was void because H. P. had left sufficient personal property to pay his debts, and that the executor had improperly expended large sums in costs in the Probate Court, in proceedings which he had no right to take; that he had acted fraudulently towards the estate; and that the defendant who had been his attorney in the proceedings in the Probate Court, was cognizant of the fraud of the executor, and had no right to purchase from him. A verdict having been found for the defendant.—

Held on motion for a new trial, that though a large amount of costs appeared to have been incurred in the Probate Court, and the proceedings there were irregular, it did not avoid the defendant's deed; that the parties interested under the Will should have appealed from the decree of the Probate Court granting license to sell the real estate, and could not object to the irregularity of the proceedings in this action.

Ejectment for land in Queen's County. The lessors of the plaintiff claimed as divisees under the will of Henry S. Peters; the defendant claimed under a deed from Peters' executor, under a license from the Probate Court. The lessors of the plaintiff contended that the license was void, because the testator had left sufficient personal property to pay his debts, and that the executor had improperly expended large sums in costs in the Probate Court, in proceedings which he had no right to take; that he had acted fraudulently towards the estate; and that the defendant, who had been his attorney in the proceedings in the Probate Court, was cognizant of the fraud of the executor, and had no right to purchase from him. Verdict for defendant.

A rule *nisi* for a new trial having been obtained at a previous term, on

Jnne 14, 1871. *A. L. Palmer, Q. C.,* shewed cause.

Doe d SULLIVAN *v.* CURREY.

C. N. Skinner, Q. C., and *C. W. Weldon*, were heard in suppo of the rule.

The following cases and authorities were cited: *Doe d. Jon v. Hughes;*[1] *Harrison v. Morehouse;*[2] *Coy v. Coy;*[3] *Wms. Exor* 1526.

Cur. Adv. Vult.

The judgment of the court (RITCHIE, C. J., and ALLEN, WE DON and FISHER, J. J.) was now delivered by

RITCHIE, C. J. We think the Probate Court had jurisdictic to make the order for a sale in this case. We have no power investigate the accounts passed before the Probate Court an adjudicated on by that tribunal.

If the decree then arrived at was unsatisfactory, the part dissatisfied should have appealed. We think there was no suc legal fraud established as would avoid the deed, and have justific the judge in directing a verdict for the plaintiff. The question (fraud, in fact, the judge offered to leave to the jury, but this tl plaintiff's counsel stated he did not wish done, as he did not charg the defendant with actual fraud.

Though we cannot disturb this verdict, we do not wish it to b supposed that we sanction the manner in which the accounts i this case appear to have been kept by the executor, or the pr ceedings taken and prosecuted in the Probate Court, or the cour adopted in that Court, whereby very large expenses would appe to have been incurred—whether necessarily or not, would seem be extremely doubtful.

Rule discharged.

1872. June

Ex parte REYNOLDS.

Absconding Debtors Act, 1 Rev. Stat. c. 125—Whether repealed b the Insolvent Act of 1869.

The Absconding Debtors Act. 1 Rev. Stat. c. 125. is repealed by "the Insolve Act of 1869."

In this case a rule *nisi* was granted by WETMORE, J., Chambers, for a *certiorari* to remove proceedings taken again

[1] 6 Exch. 226. [2] 2 Kerr, 584. [3] 1 Han. 177.

Reynolds as an absconding debtor, the ground being that the Absconding Debtors' Act is repealed by the Insolvent Act of 1869.

Feb. 8, 1872. *Gross* shewed cause.

Burtis in support of the rule.

Cur. Adv. Vult.

The judgment of a majority of the Court (RITCHIE, C. J., and ALLEN and WETMORE, JJ.) was now delivered by

ALLEN, J. This was an application for a *certiorari* to bring up the proceedings taken against Reynolds under the Absconding Debtors' Act, (1 Rev. Stat. c. 125,) on the ground that it is repealed by "The Insolvent Act of 1869," (32 and 33 Vic. c. 16 of Canada.)

Reynolds carried on business in Portland, St. John, as a Grocer and Liquor Dealer. He left his residence in August, 1871, being indebted to one Patton, in the sum of $256. Shortly after he left, Patton called at his house and enquired of his wife where he was: she said he had gone to Boston, and she did not know when he would return. On proof of these and other facts to prove his absconding, proceedings were taken under the Absconding Debtors' Act, and his property attached.

It was contended in support of the application for a *certiorari*, that the two Acts are inconsistent in their provisions, and therefore that the Absconding Debtors' Act is repealed by the 154th Section of the Insolvent Act. This is a question of considerable importance, and we regret that we have not been able to arrive at a unanimous conclusion upon it.

It is important to bear in mind that the Absconding Debtors' Act is not applicable to traders only, as the Insolvent Act of 1869 is, and is not based on bankruptcy or insolvency; but is applicable to all persons, whether traders or not, and whether insolvent or not. It provides a mode of proceeding against the estates of persons indebted in a certain amount, (which may be less than the sum required to warrant compulsory proceedings under the Insolvent Act,) who shall depart from, or keep concealed within this Province, with intent to defraud their creditors; or, against the

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estates of persons, so indebted, departing from or residing out of the Province after the debt was contracted, and after an absence of six months next preceding the application for a warrant of attachment.

There is nothing in the Act that necessarily conflicts with the Insolvent Act; in fact, in many cases there cannot be any conflict. In the first category of the Absconding Debtors' Act, the debtor, who may or may not be a trader, and who may or may not owe the sum mentioned to warrant proceedings under the Insolvent Act, is a fraudulent debtor, but not necessarily an Insolvent or bankrupt debtor; and in the latter the person residing out of the Province for six months after the debt was contracted, may be neither a trader, nor a fraudulent, nor an insolvent, nor a bankrupt debtor, nor in any respect subject to the provisions of the Insolvent Act.

If a trader absconds, or is immediately about to abscond with intent to defraud any creditor, or to defeat or delay the remedy of any creditor, or to avoid being arrested or served with process or if, being out of the Province, he so remains with the like intent; or if he conceals himself within the Province of Canada with the like intent, he shall, under the 13th section of the Insolvent Act be deemed insolvent and his estate become subject to compulsory liquidation; and no doubt proceedings thereunder could be taken, and if taken, would be valid. But that by no means repeals the Absconding Debtors' Act.

Should proceedings be taken under both Acts, in the case of a trader, where the circumstances made his estate subject to one or other, or both Acts, a conflict of right might arise. It will then be time enough to decide which Act, or the proceedings under it, shall have priority or effect or in what respect, or how far the Absconding Debtors' Act shall be in such a case, if at all, subordinate to the Insolvent Act. No such question arises in this case.

By "The British North America Act, 1867," § 92, the Legislature of each Province may exclusively make laws in relation to matters coming within certain classes of subjects therein enumerated; among which are:—(Paragraph 13) "Property and Civil Rights in the Province." (14) "The administration of Justice in the Province, including the constitution, maintenance and or-

ganization of Provincial Courts, both of civil and criminal judicature, and including procedure in civil matters in those Courts."

Under these powers, the subject of the Rev. Stat., c. 125, relating to the civil rights of parties against the estates in the Province of absconding debtors, and the procedure in such civil matters would clearly seem to come.

It may be quite true, that if the Provincial Act was entirely inconsistent with the Insolvent Act of 1869, and both could not stand together, the former would be repealed by the latter; but we can see no reason why the words of the Insolvent Act may not have their proper force and effect, and the Absconding Debtors' Act also remain in force—applicable to all cases to which the Insolvent Act does not apply, and to all other cases where no conflict is raised by reason of proceedings being taken under both Acts.

For these reasons, we think the rule for a *certiorari* must be discharged.

FISHER, J., was of opinion the proceedings should have been taken under the Insolvent Act.

Rule discharged.

FALCONER *v.* THE EUROPEAN & NORTH AMERICAN RAILWAY COMPANY FOR EXTENSION FROM ST. JOHN WESTWARD.

1872.
June

Trespass—Killing cattle—Railway train—Negligence—Evidence.

In this case, which was for running over and killing cattle on the track of the defendants' Railway the evidence of negligence relied on, was that at the time the cattle were killed, the train was being run with the engine behind, which was alleged to be less safe than running in the ordinary way, with the engine at the head of the train; it appeared, however, that the train was not a long one; that a man was stationed on the front car to look out for obstructions on the road, and to signal the engine driver; that the train was going round a curve at the time, at a slow rate of speed; that every precaution was taken to prevent accidents; and that the train was stopped as soon as it could have been if the engine had been in front.

Held, there was not sufficient evidence of negligence to leave to the jury.

This was an action of trespass for running over and killing the of the plaintiff's by the defendants' railway train. It was eed at the trial before the Chief Justice, at the York sittings, t certain questions should be submitted to the jury, without the

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Chief Justice determining whether they were properly submitte not, the Court being at liberty to enter a non-suit, or to m the verdict for plaintiff or defendants as the Court, under the and evidence, and the finding of the jury on questions prop submitted might think right. The facts in the case are fully st in the judgment.

April 17. *Rainsford* for the plaintiff.

C. N. Skinner. Q. C., for the defendants.

Cur. Adv. Vult.

The judgment of the Court (RITCHIE, C. J., and ALI WELDON, and FISHER, JJ.) was now delivered by

RITCHIE, C. J. This case was opened as an action of tresp for killing two cows belonging to the plaintiff. Plea—the gen issue, with notice of defence, that the defendants were run their Locomotive legally on the railway between McA Junction and St. Croix, and the plaintiff's cows were allc negligently and illegally to come on the track, where the def ants were not bound to fence. The plaintiff's counsel alleged that the place where the cows were killed, was a p that the defendants were bound to fence. This was the only stantial, and in fact, the only issue on the question of negligc raised by the plaintiff in his opening.

The act under which the plaintiff attempted to fix on defendants the obligation to fence, is 27 Vic. c. 43, § 7, wl provides that this Railway Company "shall erect and main substantial legal and sufficient fences on each side of the land ta by them for their railroad, where the same passes through encl or improved land, or lands that may hereafter be improved,

* * provided however said such fences may be disper with at the receiving and landing places of passengers freight, and at such other places as fences are not elsewl usually required."

On this point the Chief Justice left two questions to the jury, first, did the railway pass through enclosed or improved land at the place where the cattle were injured? Secondly, if it did, was it such a place as fences were usually or not usually required? The jury answered both the questions in the negative.

The defendants' counsel opened that he would shew that the railway ran through a country that did not require the road to be fenced; that the plaintiff allowed his cows to go at large without care, and contributed to his own loss, and that he should negative any negligence on the part of the defendants in running their train to St. Croix.

No evidence was given on the part of the plaintiff as to any improper arrangement of the train, or of the employment of unskilled or improper persons, or of any negligence in running the train, independent of the liability to fence.

On the defence, it appears by the evidence of the conductor, that the manner in which he arranged his train at McAdam Junction for St. Croix, was as follows:—"A car of bark farthest from the engine, towards St. Croix, a box car next; then a second class car, engine attached next between the cars and tender, fronting towards St. Croix." He then said—"I directed the brakesman to attach the alarm line fast to the bell of the engine; he did so. I then directed him to go on the car of bark, which he also did, taking one end of the line with him, so that in case of danger he could give immediate alarm to the driver, who was on the engine: this was done before starting." He said: "There was no siding at St. Croix, and we had to run the engine as we did, in order to leave the cars to be unloaded. We could not have done it any other way: we would have had to remain till the cars were unloaded." This witness was not examined by either side as to the propriety or impropriety of making up a train in the manner this was done. The driver of the Locomotive says:—"Before approaching the curve (where cattle were killed) I gave a long whistle for the purpose of alarm. I was looking out of the inside of the curve, and I saw the cattle about two trains' length ahead; as soon as I saw the cattle the brakesman at the same time gave the alarm—I signalled 'on brakes'—they were put on, and were on when the cars were off the track,—I saw almost as soon as the

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brakesman—there might have been a little difference, but nothing t speak of—we did everything that could be done." The conductc says:—"We were running about ten or twelve miles an hour—rather a slow rate." The driver says, "we were running fro nine to twelve miles an hour, as nearly as I can judge: rather slow rate of speed." On cross-examination he says, "we cou not have gone round much slower." He also said—"It is custo ary to run the locomotive ahead of the train; there are no sidin at St. Croix." In answer to a question by the Court, he s "It is safest to run the engine in front. * * * the locomotive had been in front, it would have made no diff ence. I think I saw the cattle as soon as I could have done i had been on the engine, and the engine in front." The condu describes the accident thus—"I started the train and ran with any interruption to within about thirty rods of the Woodst road; when I got that far I heard the signal for 'down brea The train stopped almost immediately. As soon as the t stopped, I stepped off and walked round to see what had happe I saw the car of bark off the track, also one truck of the box and that there were two cattle killed under the train— was under the forward part of the engine—there was not that I am aware of that I could have done, that was not don save the cattle. The cattle could only be seen a very short tance ahead—not more than twenty rods. The flat car was feet long; box car, 30 feet; second class car 50 feet; locomo and tender, 20 or 30 feet—I think the brakesman did al could." On cross examination he says—"The cow-catcher the engine is put there to prevent cattle getting under the engi and is no protection to the cattle: it only prevents the engi being thrown off the track. I never knew an instance of a being saved by the catcher." * * * "Half a minute after brakes were signalled the train stopped. In going round cu we usually sound the whistle before we come round the curve. I think we did so on this occasion."

At the close of the evidence, it was agreed that certain qu tions should be submitted to the jury, without the Chief Just determining whether they were properly submitted or not. T Court to be at liberty to enter a non-suit if the plaintiff ought

have been non-suited; or to mould the verdict for plaintiff or defendants, as the Court under the law and evidence, and the finding of the jury on questions properly submitted, might think right.

Whether under the evidence, the question as to the character of the land, or the duty of the defendants to fence, was properly submitted, is now immaterial, the jury having found on those questions in the negative.

The material question in the case, as it now stands, is substantially the fourth submitted to the jury—namely, "Were the cows injured by reason of any negligence or improper conduct of the defendants in the manner of running their train? To which question the jury answered' 'yes,' adding as their reason for arriving at this conclusion: "Inasmuch as, had the train been made up differently locomotive ahead, as it should have been, it is very probable the accident would not have occurred. We also find negligence on the part of the Company, in allowing a fireman, or other than a properly recognized engineer to run their engines." The principles which govern cases of this kind may be shortly stated thus:—If the fact of negligence is left doubtful, the defendants are entitled to a verdict: *Phelps v. The Great Eastern Railway Company.*[1] If the evidence is equally consistent with the absence, as with the existence of negligence in the defendant, the Judge ought not to leave the case to the jury: *Cotton v. Wood.*[2] In *Toomey v. The London and Brighton Railway Company,*[3] WILLIAMS, J., thus states the law: "It is not enough to say that there was *some* evidence, for every person who has had any experience in Courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants clearly would not justify the Judge in leaving the case to the jury; there must be evidence from which they might reasonably and properly conclude that there was negligence." This rule was adopted by BRAMWELL, B., in *Cornman v. The Eastern Counties Railway Company,*[4] and by ERLE, C. J. in *Cotton v. Wood* (*supra*); and the same principles will be found in a number of other cases. The fact

[1] 21 Law T. 443.
[2] 3 C. Bench N. S. 146.
[3] 8 Bench N. C. S. 568.
[4] 4 H. & N. 781.

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that an accident has occurred is not of itself evidence of negligence, because its occurrence is quite consistent with due care having been taken. The plaintiff is not entitled to have his case left to the jury unless he gives some affirmative evidence of negligence: *Hammack v. White.*[1] In *Daniel v. The Metropolitan Railway Company,*[2] WILLES, J., says that, to entitle a plaintiff to recover in an action for negligence, he must establish in evidence circumstances from which it may fairly be inferred that there is reasonable probability that the injury resulted from the want of some precaution to which the defendant might, and ought to have resorted.

Now, applying these principles to the present case—what affirmative evidence of negligence did the plaintiff give? Clearly none. Admitting that the train was run in an unusual and in some respects, an unsafe manner, did the defendants omit any reasonable precautions while they might, and ought to have resorted to, to prevent accidents? We can find nothing in the evidence to show that they did; on the contrary, all the evidence we have on the point, shews that they used every reasonable care; and no other course was suggested that they could have adopted to prevent the accident, nor is there the slightest evidence that the means they adopted were insufficient. There does not, therefore, appear to be any more danger of an accident from the manner in which they were running, than if the train had been running in the ordinary way.

The manner in which the train was run and the knowledge and skill of the driver came out incidentally on the trial, and we have the uncontradicted testimony of the conductor and driver on these points; and from this, it would very clearly appear that neither the manner of running the train nor the *status* of the driver in any way contributed to the accident. It by no means appears from the evidence that running a train made up in the manner this was, was in railway management a wholly unjustifiable act, or that the precautions taken in this case were not reasonable and sufficient; and, if the driver was actually competent to take charge of a train, (as he swears he was, and there is no evidence to the contrary) and he appears to have acted in that capacity on former occasions, and immediately afterwards to have passed his examination and

[1] 11 C. Bench N. S. 588.

[2] 3 Law R. C. P. 216.

received the appointment of engineer, we can see nothing to warrant the conclusion that the accident was the result of any want of skill on his part, or that so employing him was any negligence on the part of the defendants, contributing to the accident. We do not wish, however, to be supposed for a moment to sanction the idea that railway companies are not bound on all occasions to employ skilled, competent and experienced servants, and to run their trains with all care and circumspection, and in a manner calculated to secure the safety of their passengers and the public, by the adoption of all such proper and reasonable means as experience has proved expedient and necessary for attaining that end; or that if the railway is deficient in sidings, or turn-tables, or the road or rolling stock otherwise incomplete, and unfit to be safely and properly worked, it is competent for them to utilize such road, when the doing so involves danger and hazard to individuals or the public, to which they would not be exposed on a road reasonably and properly finished and equipped, unless indeed, such hazard or danger is overcome by the adoption of extraordinary precautions—the burthen of shewing which would, under such circumstances, be on the railway officials.

We therefore think the verdict must be entered for the defendants.

Judgment for defendants.

STEEVES *v.* WILSON.

1872.
June.

(Decided in Michaelmas Term, 1869, but inadvertently omitted from the reports of that term.)

Replevin—Goods not replevied—Declaration—Evidence—Damages

A declaration in replevin charged defendant with taking and detaining 500 pieces of deals, 20 futtocks and 20 ship knees on the first September, 1867. Plea—as to all except 314 pieces of the deals, *non cepit*, and as to them property in defendant. Under the writ of replevin the Sheriff took a railway car load of deals, containing 314 pieces. The plaintiff claimed 84 pieces as having been taken from him by the defendant, but only gave evidence of 18 pieces in the load as being his property. No futtocks or knees were found or replevied, they having been taken by the defendant in 1865. It was doubtful under the evidence, whether the Sheriff had delivered to the plaintiff the 84 pieces of deals or only 18 pieces, and also what had become of the remainder of the load. Verdict for the plaintiff for the value of the futtocks and knees, and for the defendant on the plea of property, for the value of the load of deals.

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Held, 1st. That the futtocks and knees not having been replevied ought not to have been included in the declaration and that the plaintiff could not recover for them. 2nd. That the defendant had a right to shew at the trial that the futtocks had not been replevied. 3rd. That the defendant was only entitled to damages for the value of the deals replevied and delivered by the Sheriff to the plaintiff, and not for the whole load, and that it should have been left to the jury to determine what portion of them was so delivered.

Replevin. The declaration contained two counts—the first alleging a taking and detention of 500 pieces of deals, 20 futtocks, 20 knees, and 20 pieces of ship plank belonging to the plaintiff, at a certain place called the Salisbury Railway Station, in the Parish of Salisbury, on the 1st September, 1867: the second count alleged the taking to be in a certain close called the roadway of the European and North American Railway, in the said Parish. Plea—*non cepit* as to all the goods except 314 pieces of the deals; and property in them.

At the trial before WELDON, J., at the Westmorland Circuit, it appeared that the writ of replevin was issued about the 3rd September, 1867, directed to the Sheriff of St. John, under which he took a car load of deals pointed out to him by the plaintiff, and containing 314 pieces The plaintiff only claimed 84 pieces of the deals as belonging to him, and which he contended had been taken by the defendant at Salisbury, and mixed with his own deals in making up the car load. The plaintiff stated that he went with the Deputy Sheriff to execute the writ of replevin; that he identified 18 pieces of the deals as belonging to him; that he put his hand upon one piece, and the Deputy said to him, "In the name of that piece of deal, I deliver to you the 84 pieces.' Another witness—one of the officers of the railway—said that the Deputy Sheriff delivered the car load of deals to the plaintiff; that the plaintiff pointed out 18 pieces of the deals to the Deputy Sheriff and objected to take the whole car load; but that the Deputy said the plaintiff had replevied the whole car load, and must take the whole; that the plaintiff did not say he would take delivery of the whole; but that the Deputy put his hand on a deal, and said—"By this deal. I deliver you the whole car load." It also appeared that in December, 1865, five futtocks and two knees, which the plaintiff claimed as his property, had been taken by the defendant's men and put upon a car loading with lumber at Salisbury Station, and sent away by the defendant. An application

was made to the Judge at the trial, to strike the futtocks and knees out of the declaration, on the ground that replevin would not lie for property not taken by the Sheriff under the writ; and it was agreed that a verdict should be taken for the plaintiff for the value of the futtocks and knees, with leave to the defendant to move to enter a verdict in his favor, if the Court should be of opinion that replevin would not lie in such a case. It did not appear very clearly what quantity of the deals the plaintiff actually got—the Railway Company refused to deliver him any part of the deals unless he paid the freight on the whole; they were afterwards sold to pay the freight, and the net proceeds amounted to about $52. The jury found for the defendant on the plea of property in the deals, and assessed the damages to him under 1 Rev. Stat. c. 126, § 16, at $152, the value of the 314 pieces of deals.

In Hilary term, 1869, a rule *nisi* for a new trial was obtained on the part of the plaintiff, on the ground of misdirection as to the plaintiff's liability for the car load of deals; or, to reduce the damages to $52, the value of the deals after paying the freight. The defendant also obtained a rule *nisi* to enter a verdict in his favor for the value of the futtocks and knees, as found by the jury.

In Easter term, 1869, *D. S. Kerr, Q. C.*, shewed cause against the first rule—contending that the issue on the plea was, whether the 314 pieces of deals were the property of the plaintiff or of the defendant, and the jury having found that issue in favor of the defendant, he was entitled under the statute, to recover the value of all the deals taken out of his possession by the Sheriff under the writ of replevin, and damages for the taking. That after the deals were replevied, the defendant ceased to have any control over them, and the plaintiff, having set the Sheriff in motion, was responsible for whatever quantity of deals the Sheriff replevied. There was evidence that the plaintiff took possession of the whole of the deals. In support of the other rule, he contended that the plaintiff could not recover the value of the futtocks and knees; that he was bound to prove the existence of some article that was capable of being taken by the Sheriff under the writ. These goods ceased to have any existence nearly two years before the writ issued: 1 *Chit. Pl.* 350; *Co. Lit.* 283 (*a*) and *Bac. Abr., Replevin* (*H*) were cited.

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STEEVES v. WILSON.

A. L. Palmer, in support of the rule, contended that the plai tiff was only responsible for the value of the deals the Sheri delivered him, which, at most, were 84 pieces, and not the who car load. The evidence did not warrant the jury in finding th the plaintiff had received more than 84 pieces; and the Jud was wrong in directing the jury that the plaintiff was liable for t value of all the deals mentioned in the writ. The damages we excessive, as the utmost the plaintiff could be liable for, was t balance left after deducting the freight and charges paid to t Railway Company. In opposition to the defendant's rule, he co tended that the verdict was right for the value of the futtocks a knees.

Cur. Adv. Vult.

RITCHIE, C. J., now delivered the judgment of the Court.

We think the defendant was only entitled to recover the va of the deals on the car taken by the Sheriff under the writ replevin, and delivered to the plaintiff. If the plaintiff o pointed out 18 pieces of deals, and the Sheriff only gave syn lical delivery of these—the car being in the actual possession the Railway Company—the defendant is only entitled to reco the value of the deals so symbolically delivered. But there is evidence to shew that the Sheriff professed to deliver 84 piece th Railway officer proves that the Sheriff delivered the whole c load; though the plaintiff stated that he only accepted 18 piece which he identified as belonging to him. The question as to wh quantity was actually replevied and delivered to the plaintiff should have been submitted to the jury. This was not done therefore, unless the parties agree to reduce the verdict to th value of the 84 pieces, or the defendant is willing to reduce th amount found for him to the value of the 18 pieces, there must b a new trial.

As to the rule obtained by the defendant. We think the plai tiff cannot recover for the futtocks and knees. They not havin been replevied by the Sheriff, should not have been included i the declaration. It was competent for the defendant to shew o the trial that they had not been replevied; and being shewn,

was a sufficient answer to the plaintiff's claim to recover damages for the taking of them. The case of *Wood v. Foster*[1] is directly in point. It was held there, that in replevin, where the plaint is "of one thousand beasts, and the defendant justifies by reason of property, upon which the parties are at issue; now upon the evidence, the defendant may surmise a lesser number of beasts, and advise the plaintiff to prove a greater number than that which the defendant hath confessed upon the evidence, notwithstanding that the number set down in the plaint, be by the plea of the defendant *quodum modo* admitted; and the lesser number surmised, and the contrary not proved, shall go in mitigation of the damages, and the jury shall conform their verdict in the right of damages, according to the proof of the number, notwithstanding that the number set forth in the plaint be not by the plea denied by the defendant, and so it was put in use in this case; for the plaint was of the taking of one thousand cattle, but the proof extended but to eight hundred and sixty-five."

If the parties agree to reduce the verdict on the issue found for the defendant, the rule obtained by the defendant will also be made absolute:—otherwise there will be a new trial.

Judgment accordingly.

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[1] Leon. 42.

CASES DETERMINED

BY THE

'REME COURT OF NEW BRUNSWICK

IN

MICHAELMAS TERM, XXXVI VICTORIA

CANBY *v.* WRIGHT.

1872.
October

issory note—Entry in deceased Notary's book—Residence of party—Presumption.

the endorser of a note (the defendant) and several of his brothers lived their mother, and the proof of service of notice of dishonor was an entry book by a deceased Clerk of a Notary, whose business it was to serve es of dishonor and to make entries thereof in a book, and who had been ted to serve the notice at the residence of the defendant ——— red on brother at residence."

n the absence of evidence that any brother of the defendant had any other ence than at their mother's house, that it was a fair presumption that the e had been served there, and that the Judge was warranted in leaving it e jury to find whether it had been duly served.

his was an action of assumpsit brought against the defendant lorser of a promissory note. At the trial before WELDON, J., St. John Circuit, in November, 1871, a verdict was found e plaintiff. In the following Hilary term, a rule *nisi* for a rial was obtained by *Haliburton Weldon,* against which on

t. 14. *Demill* shewed cause.

. *Weldon,* in support of the rule. The facts of the case are ently stated in the judgment.

Cur. Adv. Vult.

he judgment of the Court was now delivered by

LLEN, J. It appeared that the defendant and his brothers, boys," as one of the witnesses called them) lived with their

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father at his residence, up to his death, and afterwards witl mother at her residence. When the note fell due, the def was absent from home coasting in a schooner, or in Bos Portland, looking after some old debts—he could not say e where he was at that particular time; but wherever he w absence was only temporary, with the intention of returnin he had in no way changed his domicile, or abandoned his place of residence in St. John. It did not appear that any defendant's brothers had any other place of residence in St. than their mother's. The notice of dishonor was served l clerk of Mr. Robinson, the notary of the Bank, who proved out objection, that he had instructed his clerk to leave the at the defendant's residence. The clerk was dead at the ti the trial, and the entry in his book, kept for the purpose of m entries of such matters, was put in evidence to prov service. The entry in a column headed, *"On whom serve* was as follows:—"On brother at residence." Now, residence under the circumstances and within the fair con tion and meaning of the expression used, could it be tha clerk referred to in the entry? Had it been,—"serve servant at residence"; or "on wife at residence;"; or, clerk at office," or "store"; could there be the least as to whose residence, office, or store, was named? It wa clerk's duty to leave the notice at the defendant's residence the evidence, unobjected to, shewed that he was instructed so. On his return, in the due and ordinary course of busine entered in the Notary's record book kept for the purpose, he did in pursuance of that duty and of those instructions. this entry then be read to the effect, that in defiance of he improperly left the notice at the residence of another and not at the defendant's residence; and made an ambi notice, calculated to mislead his employer? Is it not a fai reasonable presumption of fact that if the notice had not properly served, no minute at all would have been made, any, that the particulars, which prevented a proper service made, would have been clearly set forth? Ought not the then, to be read as the record of the fact that the clerk had

perly discharged his duty? There is no evidence to raise a counter presumption; nor any evidence that any brother of the defendants had any other residence in St. John, than the residence of their mother, which was clearly proved to be the residence of the defendant. Could the Judge, under these circumstances, say there was no evidence of due service? Surely the entry in the book, and the surrounding circumstances, especially the absence of any evidence of there having been any other residence of any of the defendant's brothers, at which it might or could have been left, and there being only one residence proved that could fill the words of the entry, were sufficient to warrant the Judge in leaving it to the jury to find whether they were satisfied the notice had been duly served; and having so found, we think the judge was right in ruling that the notice was sufficient.

The rule must be discharged.

Rule discharged.

REG. v. MCAVITY. *In re* MCCARTHY.

1872.
October

Shipping Law—Certificate of registry—Refusal to deliver up.

A person who had been part owner of a ship, and as such had possession of the certificate of registry, and who refuses to deliver it up to a purchaser of the ship at Sheriff's Sale, is not liable to the penalty imposed by the 50th Section of "The Merchant Shipping Act 1854," such certificate not being required by the purchaser for the "lawful navigation" of the ship; but to enable him to perfect his title, by having the change of ownership indorsed upon it, or by delivering it up, and obtaining a new certificate in lieu of it.

McCarthy having been fined by the Police Magistrate of St. John for refusing to give up the certificate of registry of a vessel to Dunn, the registered owner, a rule *nisi* to quash the conviction was obtained on behalf of McCarthy. The section of the Act under which the proceedings were had, as well as the facts of the case are stated in the judgment.

June 24. *A. L. Palmer, Q. C.,* shewed cause.

S. R. Thomson, Q. C., in support of the rule.

Cur. Adv. Vult.

1872.

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v.
MCAVITY.

The judgment of the Court was now delivered by

RITCHIE, C. J. The proceeding on which the conviction this case was made was under the 50th Section of "The Mercha Shipping Act," (17 and 18 Vict. c. 104,) which enacts as f lows:—"The certificate of registry shall be used only for t lawful navigation of the ship, and shall not be subject to detenti by reason of any title, lien, charge, or interest whatsoever whi any owner, mortgagee, or other person may have or claim to ha on or in the ship described in such certificate; and if any pers whatever, whether interested or not in the ship, refuse on reque to deliver up such certificate when in his possession, or under h control, to the person for the time being entitled to the custo thereof for the purpose of such lawful navigation as aforesaid, to any registrar, officer of the Customs, or other person legal entitled to require such delivery, it shall be lawful for any Justic by warrant under his hand and seal, or for any Court capable taking cognizance of such matter, to cause the person so refusing appear before him, and to be examined touching such refusa and unless it is proved to the satisfaction of such Justice or Cou that there was reasonable cause for such refusal, the offender sh incur a penalty not exceeding £100; but if it is made to appe to such Justice or Court that the certificate is lost, the party co plained of shall be discharged, and such Justice or Court sh thereupon certify that the certificate of registry is lost."

Dunn, the prosecutor in the information, claimed the certific of registry for the lawful navigation of a vessel, which he stat he was the owner of, and it appeared by a certified copy from t Registrar's book that he was the owner at the time of the dema of the register, and of these proceedings, and that he derived title by a bill of sale from the Sheriff of Pictou, Nova Sco dated 19th August, 1870, under a judgment of the Supre Court of Nova Scotia. It also appeared by the Register b that the defendant (McCarthy) had been one of the owners of t vessel prior to the sale by the Sheriff, and he stated that he clair to hold the certificate of registry as such owner, disputing t validity of the sale in Nova Scotia.

Under these circumstances, the question arises whether Du was entitled to the custody of the certificate "for the lawf navigation" of the vessel, within the terms of the Act?

Assuming him to have been the legal owner, could he have used the certificate for the purpose of navigating the vessel—the only purpose for which it is now required? He clearly could not in its existing state; for he would be required, either to have the change of ownership indorsed upon it by the Registrar or obtain a new certificate in lieu of it, under the 45th Section.

In neither case can it be said that he wanted the certificate for the lawful navigation of the vessel. He wanted it to perfect his title, and for that alone: that is, to enable him to get a certificate of registry under which he could lawfully navigate the vessel, or, to have the certificate he now claims so altered by indorsement as to enable him to use it for such a purpose. If he had possession of the certificate as he claims it, he could not lawfully navigate the vessel under it. Therefore, as this is a proceeding under a penal clause in the Act, which must be strictly construed, before a party can be made liable for the penalty, he must be brought clearly within the terms of the act.

Conviction quashed.

PUGSLEY *v.* GILLESPIE.

1872.
October

Statute of frauds—Sale—Land—Identity—Evidence—Damages—Vendor—Sum agreed to be paid for land by vendee.

Defendant, by writing addressed to the Plaintiff, stated that he would "take property" and give his notes for a certain sum. Plaintiff wrote on the same paper, that he could not sell "property," but would "redeed to H." and take notes for a certain sum, specifying the time of payment; to which the defendant agreed. Plaintiff proved that H. had conveyed to him the Equity of Redemption in a certain property.

Held, that this sufficiently indicated the property referred to in the agreement; though if necessary, parol evidence was admissible to shew what property the agreement related to.

In an action against the vendee for breach of an agreement to purchase land, the plaintiff cannot recover the amount of the purchase money agreed to be paid for the land; but only such damages as he has sustained by the breach of the agreement.

This was an action of assumpsit tried at the St. John Circuit, in August, 1871, before FISHER, J. Verdict for plaintiff. In the following Michaelmas term, *Duff, Q. C.*, obtained a rule *nisi* for a non suit, pursuant to leave reserved, on the ground of there not being a sufficient memorandum in writing to satisfy the statute of frauds; or for a new trial; or to reduce the verdict.

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April 20th, 1872. *A. L. Palmer, Q. C.,* shewed cause, citing *Shortrede v. Cheek.*[1]

Duff, Q. C., in support of the rule, cited *Boydell v. Drummond;*[2] *Tyson v. Kitton;*[3] *Williams v. Lake;*[4] *Skelton v. Cole;*[5] *Fitzmaurice v. Bayley.*[6]

Cur. Adv. Vult.

The judgment of the Court was now delivered by

ALLEN, J. The question in this case is, whether there is a sufficient memorandum in writing of the contract between the parties to satisfy the statute of frauds?

The defendant wrote and signed a paper in the following words:—

"Will take property by deed, and give my notes for $409, at ninety days, and for *bonus,* my notes at four, six, and nine months."

On the back of this paper, the plaintiff wrote as follows:—"Can't sell property, but will redeed to Hamilton, and take notes four, six and nine months for $300, $229 to be paid at once, $180 to meet instalment 1st March, and $41, as you and Hamilton agree—this I have nothing to do with."

"G. R. PUGSLEY."

Underneath which, the defendant wrote:—"Agreed to—THOMAS GILLESPIE, 6th January, 1871."

Though it may be somewhat difficult to get at the exact meaning of the parties, we think it may fairly be gathered from the writing, that the *"property"* they had reference to, was a property which Hamilton had previously conveyed to the plaintiff:—this is evident from the words, "re-deed to Hamilton."

The plaintiff proved by the production of the deeds that one Hamilton had mortgaged a property in Sussex, to Geo. H. Barnes, on the 8th February, 1870, and on the 19th December following, had conveyed the equity of redemption to the plaintiff—and his partner, Mr. Crawford. There was no evidence of any other property conveyed by Hamilton to the plaintiff, and it seems to us

[1] 1 A. & E. 57.
[2] 11 Ea. 141.
[3] 30 L. & E. R. 374.
[4] 2 El. & El. 349.
[5] 1 De G. & J. 587.
[6] 9 H. L. Cas. 78.

that it sufficiently identified the property which the parties were treating about, without any parol evidence. If parol evidence was necessary for the purpose of identification, it was competent for the plaintiff to give such evidence, under the authority of *Ogilvie v. Folyainbe,*[1] where the Master of the Rolls says: "The subject matter of the agreement is left indeed to be ascertained by extrinsic evidence, and for that purpose such evidence may be received. The defendant speaks of Mr. Ogilvie's house, and agrees to give £14,000 for the 'premises'—and parol evidence has always been admitted in such a case to shew to what house and to what premises the treaty relates." This case is recognized in *McMurray v. Spicer,*[2] and the same principle will be found in *Horsey v. Graham.*[3]

As to the damages—we cannot see how the plaintiff can keep the land, and also claim the price of it as part of his damages for refusing to carry out the purchase. The parties having agreed that the Court should have power to reduce the damages if they thought proper, we are of opinion that the damages should be reduced to $330, to be entered on the amended count.

If the plaintiff is not satisfied with this amount, he may have a new trial—the costs to abide the event.

Judgment accordingly.

HENDERSON *v.* THE MAYOR &c. OF ST. JOHN.

1872.
October

Pleading—Negligence in repairing street—Allegation.

The Corporation of St. John being bound by law to lay out, alter and repair the streets in the City; it is sufficient in an action against them for negligence in repairing a street, to allege that it was the duty of the defendants in so repairing &c., to use due and proper care &c.—without stating any facts to shew their liability—their authority to repair &c. being matters of public law, of which the Court was bound to take notice.

This was a motion in arrest of judgment on the ground of the alleged insufficiency of the declaration.

The first count stated that before the committing of the grievances, the defendants as the Corporation and Municipal body

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[1] 3 Mer. 53. [2] L. R. 5 Eq. 527. [3] L. R. 5 C. P. 9.

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of the City of St. John, had and did actually and continually use and exercise the sole and exclusive charge, management and control of the public roads, streets, highways and thoroughfares of the City, not only to establish, appoint, order and direct the making and laying out all streets, lanes, alleys and highways then layed out or used, or thereafter to be made, laid out and used; but also to the altering, amending and repairing the same in and throughout the City, and opening, cutting and excavating the said streets, &c., and the land and grounds through which the same might pass; and it became and was the duty of the said defendants in so exercising their said powers of making, cutting and excavating the said streets, ways &c., and the lands and grounds through which the same might pass, to use and exercise due and proper care, by keeping them free from danger, and by placing sufficient and proper guards, lights, signals, barriers or warnings at or near such cuttings and excavations when so made, in such a manner as to apprise the inhabitants of the said City having occasion to travel in the night time and darkness in the streets, &c. in which they had been accustomed to travel, and so to be cut and excavated as aforesaid, of the existence of such cuttings and excavations, in order that they might avoid the danger of falling into the same and being injured thereby; yet the defendants, not regarding their duty in the premises, heretofore, to wit on the 1st September, 1869, and on divers other days &c., in cutting a street long before then travelled and used by the inhabitants of the City as a public way, or thoroughfare, called Brindley street, leading from Waterloo street to the City Road, (so called), cut and excavated the same in so careless, negligent, and improper a manner through rocks &c., leaving a part of the rocks and stones which had become loosened by such cutting and excavation, in and on the side of such street &c., without placing any guards, lights or warnings of any kind at or near the said cutting, to apprise the inhabitants of the said City having occasion to travel in the said street in the night time, of the existence of such cutting and excavation, in order that they might avoid the danger of falling into the same; and so carelessly and wrongfully kept and continued the said cutting and excavation in the same negligent and dangerous manner, without clearing, or making the same fit for travel,

whereby the plaintiff on &c. having occasion to travel in the night time, from the direction of Waterloo street to the City road, and in attempting to pass by, through, over and along said Brindley street to the City road aforesaid, as she had long before been accustomed to do, fell into the said cutting and excavation, and upon the rock so loosened, and was thereby greatly cut, bruised and injured.

June 27, 1872. *D. S. Kerr, Q. C.,* for the plaintiff.

Duff, Q. C., for the defendants.

Cur. Adv. Vult.

The judgment of the Court (ALLEN, WELDON and FISHER, J. J.) was now delivered by

ALLEN, J. The objection to the declaration in this case is, that it does not state any authority in the defendants to lay out streets; and, consequently, that there is nothing to support the allegation of duty in the manner of laying out the streets. No doubt, in general, where a declaration, after stating certain facts, alleges that it *thereupon became the duty* of the defendant to do a certain act, such allegation is to be understood as a mere exposition of the legal liability supposed to result from the previously stated facts,—as, an assertion that the defendant became thereby bound by law to do the act; and, unless the duty results from the facts stated, the declaration is bad: *Brown v. Mallett.*[1]

In that case, it was held that the law imposed no obligation on the defendant to do that which the plaintiff complained of his having omitted,—namely, to place a buoy or signal to mark the position of a barge belonging to him, sunk in a navigable river,—and, therefore, the allegation that it was his *duty* to do so, did not supply the want of the statement of necessary facts to create a legal liability.

In this case, the defendants are empowered by the charter of the City to establish, appoint, order and direct the making and laying out of streets &c., and also to alter, amend and repair all such streets &c. as had been theretofore made, laid out, or used or that might be thereafter made, laid out, or used in the City. The charter was confirmed by the Act 26 Geo. 3 c.

[1] 5 C. B. 598.

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46; and the right to lay out and repair streets, as given by the charter, was again expressly recognized by the Act 3 Wm. 4 c. 13. This being the case, we think the statement in the declaration that the defendants had and exercised the sole and exclusive charge, management and control of the streets &c. was sufficient; without alleging how they derived their authority; because, being matter of public law, the Court is bound to take notice of it. Having, then, the authority by law to alter, amend and repair the streets, it was their duty to use proper care to prevent injuries to persons travelling on the streets while they were making such repairs. The declaration alleges that this was their duty; and we think it resulted from the facts stated, and the power given to the defendants by law, and, consequently, that the first count of the declaration is sufficient.

A question very similar to this arose on an indictment against these defendants in 1828, for not repairing a bridge. The indictment alleged, that they *"ought of right to repair,"*—without setting forth the particular ground of liability; and it was held, that, being bound by public law to repair, the obligation was sufficiently stated—the fact of their liability to do so not being traversable: *Chip. Ms.* We therefore think the first count sets out a sufficient cause of action; and even if the other counts are defective, the verdict may stand on this count, as all the evidence and the damages were applicable to it—indeed there was but one cause of action, set out with some variations in the three counts. *Milner v. Gilbert*[1] is an authority on this point.

Rule discharged.

SMITH *v.* MORROW.

1872.
October

Crown grant—Adverse possession against Crown—Sufficiency of possession—Trespass—Question for jury.

Where title is claimed under a Crown grant, which is resisted on the ground that the Crown was out of possession at the time the grant issued, and there is evidence of continuous acts of prior possession of the land, adverse to the Crown for twenty years, such evidence should be left to the jury; but in order to prevent a crown grant from taking effect on that ground, the possession should be defined, actual and continuous; mere acts of lumbering on Crown land from year to year without any apparent bounds are not sufficient.

[1] 1 Allen 51.

This was an action of trespass tried at the Sunbury circuit in July, 1871, before WELDON, J. A verdict having been found for the defendant, in the following Michaelmas term, *C. H. B. Fisher* obtained a rule *nisi* for a new trial on the ground of misdirection.

The facts of the case appear from the judgment.

April 17th, 1872. *Needham* and *Fraser* shewed cause.

C. H. B. Fisher, in support of the rule.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

ALLEN, J. The jury found the Burpee line to be the true south line of the grant under which the plaintiff claims: from this, the northern line is to be ascertained by running the course of the Grant, thirty chains, and thence parallel with the Burpee line, to the Nerepis road. A line so run would place the alleged trespass outside of the Kimball grant, and on the land claimed by the defendant under his grant from the Crown. While the plaintiff admits this, he alleges that he shewed continuous acts of possession of the land, covering a period of twenty years, before the Grant to Morrow, and therefore the Crown could not, without office found, make the grant under which Morrow claimed, and that, as against the plaintiff, the cutting complained of was an act of trespass. The plaintiff's contention now is, that such possession not having been left to the jury, he is entitled to a new trial.

To prevent the Crown from granting, or to prevent a grant actually issued from taking effect, the possession should be defined, actual, continuous and unequivocal; and wholly opposed to mere isolated acts of trespass on the Crown estate, without visible limit or continuity. To hold that mere acts of lumbering on the wilderness land of the Crown, and these too without clearly apparent bounds, would be sufficient to prevent the Crown from granting, without office found, would, in our opinion, be most unreasonable and disastrous.

A majority of the Court think there was evidence of acts of possession by the plaintiff, and those under whom he claims, outside of the Kimball Grant, for a period of twenty years, which

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ought to have been submitted to the jury; though, as the effect of this possession was a question for the jury, we do not wish to be understood as expressing any opinion as to how they ought to have found, had the question been submitted to them.

There will be a new trial, costs to abide the event.

Rule absolute for new trial, costs to abide the event.

1872.
October

GILBERT *v.* GRAHAM.

Practice—Pleading—Puis darrein continuance.

A plea *puis darrein continuance* regularly pleaded and verified by affidavit, cannot be set aside as false. If the facts stated in the plea are denied, the plaintiff should take issue on it.

June 11, 1872. *S. R. Thomson, Q. C.,* moved to set aside a plea of *puis darrein continuance* pleaded in this case at the trial in St. John before WELDON, J., in May preceding, or to take it off the files of the Court, on the ground that the statements contained in it were false. The facts were as follows. In 1870, the defendant commenced an action against the plaintiff for $368 for work and labor done on his farm, which Graham then had rented from Gilbert. Graham was then sued in this action by Gilbert for $250 for a half-year's rent due 1st November, 1870. The defendant tried his action first and recovered $18 for ditching, the rest of his claim being disproved. The action against Gilbert was commenced 31st October, 1870, before the rent from Graham to Gilbert became due. On the day after the verdict in the other case, this action was tried, when the plea of *puis darrein continuance*—pleading by way of set-off, the verdict of the day before—was put in.

A rule *nisi* being obtained, on

June 22. *A. L. Palmer, Q. C.,* shewed cause.

S. R. Thomson, Q. C., in support of the rule.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C. J. The plea *puis darrein continuance,* which we are asked to set aside, was duly sworn and regularly entered, and so took the case from the cognizance of the Judge at *Nisi Prius.* There does not appear to have been any irregularity of which the plaintiff could complain. It the plea discloses no sufficient defence, the plaintiff should demur. If the facts set forth are disputed, the plaintiff should take issue. We have no right to take this case out of the ordinary course of litigation, in this summary way, and adjudicate on matters not on the record.

Rule discharged.

MORRISON *v.* GALE.

1872.
October

Contract—Rescission of—Evidence of—Substitution of new contract—Liability—Question for jury.

Defendant agreed with the plaintiff in March, 1863, to carry deals from the Plaintiff's mill at Fredericton to St. John during the whole of the coming season at 2s. 6d. per thousand, and if plaintiff was obliged to give 2s. 9d. per thousand to others, he was to give that sum to the defendant. The plaintiff had made contracts for the delivery of deals in St. John which he afterwards assigned to T. & P. (Lumber Merchants), together with the defendant's contract; and he also agreed to saw lumber by the thousand for T. & P.; and did saw for them under such contract from the beginning of the season till October. At the opening of the season, the defendant went with his boats to the plaintiff's mill, but no deals were offered to him, and he heard that the plaintiff had sold his mill; in consequence of this he agreed with A. & P. to carry their deals for 55 cents per thousand and continued to carry them from the plaintiff's mill, where they were sawed, till the latter part of September, when the mill stopped.

Held, per FISHER and WETMORE, J. J., (WELDON, J., *dissentient.*) That there was evidence of the rescission of the contract between the parties and of the substitution of a new contract with T. & P., which ought to have been left to the jury; and that the defendant was not liable on the contract for not carrying deals which the plaintiff cut on his own account after the 1st October.

The plaintiff, proprietor of a saw mill in the vicinity of the City of Fredericton, made an agreement with the defendant on the 24th March, 1863, to employ the defendant's two Woodboats, "Guiding Star" and "Blue Jacket," during the whole of the then coming season to carry deals at 2s 6d per thousand, from his mill to St. John, and, should the plaintiff *require to give other boats 2s 9d per thousand, then he was to pay the latter price to the defendant.* After making this contract the plaintiff made contracts for the sale of lumber with certain merchants in St. John, which contracts were subsequently assigned by the plaintiff to

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Messrs. Temple and Pickard, as also the contract between the plaintiff and defendant, and it was proved on the trial that the contract between the plaintiff and defendant was, from the low freight, an inducement to Temple and Pickard in taking an assignment of the contracts with the merchants in St. John. On the trial the plaintiff stated it was his intention to have run his mill on his own account if he did not succeed in getting a contract to saw by the thousand. No intimation was given to the defendant of the plaintiff's intention to saw by the thousand. The plaintiff did contract with Temple and Pickard to saw by the thousand, and sawed for them from the commencement of the season to a period previous to the *second of October,* when he commenced sawing on his own account. The last of Temple and Pickard's lumber was taken from plaintiff's mill on 26th September by the boat "Guiding Star." The other boat made her last trip, leaving the plaintiff's mill on 14th September.

On the opening of the season the defendant came to plaintiff's mill in pursuance of his contract to carry lumber. He called at the mill. No one offered him a load, and, being informed by a person working about the mill that he believed the plaintiff had sold his mill, defendant then proceeded to the town with his boat and went to and agreed with a Mr. Dowling, who was doing business for Temple and Pickard to carry deals for them. No objection was offered to what took place between Dowling and defendant being given in evidence. Defendant informing Dowling he had bargained with the plaintiff to carry lumber, he was informed that Morrison had no deals. Dowling was to give 55 cents per thousand,—it may be observed this sum was the maximum amount provided by the Morrison contract, and he was only to pay this sum, 55 cents or 2s 9d to the defendant in the event of his (the plaintiff's) being required to pay 2s 9d. to other boats, and there was no evidence of such requirement. This arrangement with Dowling was an absolute one to pay 55 cents per thousand, and in this respect different from the Morrison contract. After mentioning the 55 cents per thousand, Dowling said "he had a piece of a raft here" (that would be near Dowling's office, a distance of over a mile from plaintiff's mill), which he wanted defendant to take in, and, on defendant's asking if he would allow any

further sum for taking deals out of the water, he replied the price would be all alike. Without seeing either Temple or Pickard the defendant took the piece of a raft on board his boat and returned to plaintiff's mill, when he completed loading in the deals belonging to Temple and Pickard, which, it would appear, were sawed for them by the plaintiff by the thousand.

In July, defendant swore he went to Temple, and he agreed to give, for the remainder of the season, 60 cents per thousand for carrying Temple and Pickard's deals, and that he continued to carry until the latter part of September (the 26th). That he took all the deals Temple and Pickard had there (at plaintiff's mill); that, to complete the last cargo, ten thousand feet more were required; that *he saw no logs at the mill* and the *mill was then shut down*. The plaintiff, in his evidence gave, as a reason for the defendant's not taking a full load, that the quantity taken was all the pine deals that were there, and, if other than pine deals were taken, it would necessitate defendant's going to two ships to discharge his load. The defendant, however, stated, as before mentioned, that he took all the deals Temple and Pickard had there. It appeared Dowling paid part of the freight and Mr. Dowling stated that he gave plaintiff some money to pay the freight of deals with.

Mr. Temple in his evidence said Temple and Pickard got an assignment of the plaintiff's contracts, and their logs were sawed at plaintiff's mill; that defendant carried deals from plaintiff's mill for Temple and Pickard. He went under an arrangement Temple and Pickard had made with Morrison, the plaintiff, but not the lowest price—some as high as 60 cents, which he took out of the water. That the defendant complained of the low contract he had made with plaintiff, and Temple told him that Temple and Pickard had made an arrangement with the plaintiff at this rate, and the defendant would have to carry it out. He said there was no other contract for carrying deals except what the defendant had made with the plaintiff. [The arrangement with Dowling, under which the defendant would seem to have commenced carrying for Temple and Pickard, was materially different, and the subsequent arrangement for 60 cents per thousand made a still further alteration.] Temple also stated that in the summer the defendant wanted more for carrying, and, on the defendant's

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refusing to carry, he (Temple) was afraid and agreed to give 60 cents for the remainder of the season. The defendant had then nearly finished carrying the deals Temple and Pickard had to be sawed at the plaintiff's mill.

Mr. Pickard in his evidence said the defendant commenced to carry under the arrangement with the plaintiff; that there was no contract with the defendant other than the Morrison one. He also stated that, when he heard that Temple had agreed to pay more than was provided for by the Morrison agreement, he objected.

It was contended on the trial (among other grounds) that there was a rescission of the Morrison contract, and a substituted one with Temple and Pickard adopted. The learned Judge who tried the cause, failing to discover any evidence to support this view, declined a motion for a nonsuit, or to leave this point to the jury. Verdict for plaintiff.

A rule *nisi* for a new trial having been obtained at a previous term, on—

April 13. *Fraser* shewed cause.

E. L. Wetmore, in support of the rule.

Cur. Adv. Vult.

The Judges now delivered the following opinions:

WETMORE, J. After stating the facts of the case continued:—On a careful examination of the evidence, I am unable to agree with the conclusion of the learned Judge.

The contract, it is true, with Morrison was to carry deals from his mill, but what deals and for whom was he to carry? And under whose direction was he to be? Might it not reasonably be contended that the defendant was to carry Morrison's deals, and not Temple and Pickard's deals? That he was to carry for Morrison and not for Temple and Pickard, and to be under Morrison's direction, and not Temple and Pickard's? And how much was he to be paid—the sum provided by the Morrison contract, or that made with Dowling, and, it may be, subsequently increased by the arrangement with Temple to 60 cents per thousand? Morrison evidently handed his contract over to Temple

and Pickard; and what control would he have over the defendant, or what right would the defendant have to call on him for his pay for freighting Temple and Pickard's deals after the defendant had assented to the transferring of the contract to Temple and Pickard? It appears to me there was evidence for the jury, either that the defendant had come under a contract with Temple and Pickard to carry for them, it may be, according to the same terms he had agreed to carry for Morrison, or under the agreement he had made with Dowling for Temple and Pickard. In either case, if the jury believed the defendant's contention, Morrison's claim had ceased. In my opinion there was evidence for the consideration of the jury, that Morrison, on the one hand, had agreed that Temple and Pickard should have the control of his contract with the defendant, and make the best they could of it, and that the defendant had determined to let Morrison go and work for Temple and Pickard. Had not Morrison, by entering into the contract with Temple and Pickard, really disabled himself from performing his contract, and the defendant, therefore, a right to rescind? See *McAuley v. Geddes.*[1] If the contract was to carry Morrison's deals, it seems to me there was evidence that he had; and I think the question of whose deals the defendant was to carry should have been submitted to the jury, before it could be said there was no evidence of rescission of the contract. Suppose the defendant, after the assignment to Temple and Pickard, and after the arrangement with Dowling, having carried a cargo of Temple and Pickard's deals, had sued Morrison for the freight, say at the rate of 50 cents as provided by the contract with the plaintiff, and he had set up as defence that the defendant had abandoned the contract with the plaintiff, so far as regarded any liability on his part for freight, and shown just what was proved in this case, could it reasonably be contended that there was no evidence to support the defence? This is only the converse of the former proposition. What claim could the defendant have had on the plaintiff for the freight, after the arrangement with Dowling, at a higher rate of freight, or the still higher one with Temple?

Or suppose, after such arrangement with Dowling, and the assignment of the plaintiff's contracts to Temple and Pickard, and

[1] 4 All. 526.

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the defendant's carrying under Temple and Pickard, down to the 26th of September, and getting an increased freight, up to 60 cents, in some cases, and in all cases, more than the plaintiff's contract provided for, except the conditional one of his being required to pay 2s. and 9d., (and there was no evidence of the contingency having arisen,) and failing to get a full load of Temple and Pickard's deals on the 26th of September, when, as the defendant says, there were no more deals to carry of theirs, no logs at the mill, and the mill actually shut down, the defendant had brought an action against plaintiff, for a breach of the contract in not furnishing a full cargo; and the same evidence was given for the plaintiff, that was given for the defendant in this cause, it seems to me there would be evidence for the jury that the contract had been rescinded, and one with Temple and Pickard substituted. This is also a converse of the position contended for on the trial.

Again, there is no pretence by the plaintiff of any breach of contract by the defendant down to the 26th of September, and, supposing the plaintiff had all his original rights under the contract—that his contracting to saw by the thousand, for Temple and Pickard, his not having any deals to carry when the defendant came up the first of the season, his not objecting to the defendant carrying deals down to the 26th of September, for them and under their directions, at an increased rate of freight, and, without objection, allowing the defendant to contract for the carrying of all Temple and Pickard's deals, that Morrison sawed for them by the thousand, which might have occupied the whole season, has in no wise impaired such original rights, had the plaintiff any right to require the defendant to carry deals for him, the sawing of which only commenced on the 2nd of October? It is not even stated when a load would be ready, which was not counterbalanced by the defendant's right, on finding there were no deals even to finish the load he was about taking on the 26th of September—no logs at the mill that he saw, and the mill actually shut down—the plaintiff himself says the mill remained shut down for *about* a week. He does not, however, state the cause—to determine the contract between the plaintiff and himself, and leave to employ his boats in other ways. This is what he did, and his right to do

so seems to me justified by *Bradford v. Williams*,[1] in which case the plaintiffs, by charter party of date 26th May, 1871, agreed with the defendant that the defendant's ship should sail to B. and there load, and proceed to H. or D., the ship was to load with G. or H. till the end of September, at the captain's option, but after September with H., and was to continue until March, 1872. In September the captain exercised his option in favor of loading with G., but the plaintiffs refused to load with G., whereupon the defendant declined further to perform the charter party. *Held*, that the breach of the charter party which the plaintiffs had committed went to the *root* of the contract between the parties, and justified the defendant in refusal. If the defendant's evidence is believed, and his statements unanswered, would he not be justified in withdrawing his boats under the circumstances detailed? Regretting my inability to agree with the learned Judge as to there being evidence for the jury to support the defendant's contention, I think there should be a new trial.

WELDON, J. The rule in this case was granted on the ground of misdirection of the learned Judge in not leaving to the jury the question whether the contract made between the plaintiff and defendant had not been rescinded.

It appeared by the evidence that the plaintiff had a steam mill below Fredericton, where deals were manufactured for the St. John market; that the defendant was owner of two woodboats, carrying deals from the mill to St. John: that the plaintiff and defendant on the 24th March, 1863, made an agreement, of which the following was entered in plaintiff's book: "arranged 24th March, 1863, with R. Gale to employ his two woodboats "Guiding Star" and "Blue Jacket" during the whole season at 2s. 6d. per thousand; should I require to give others 2s. 9d., then to pay the same to him. I also agree to give the same to his brother's boat, the "Exeter." This was read to the defendant, agreed to, and a few days after the defendant writes the plaintiff that his brother would carry deals on the same terms with his boat. The plaintiff had agreed to saw logs for Carvill in St. John; he had transferred his contract to Temple & Pickard, and they had

[1] L. R. 7 Exch. 259.

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agreed with Morrison to have their deals conveyed by the boats engaged by him. It also appeared that it was usual to engage boats for the whole season at an average rate of freight, as freights were low in summer and higher in the autumn. Before the plaintiff had commenced sawing, the defendant came in one of his boats, the "Blue Jacket," to Fredericton, having called at the mill. He saw Dowling, who informed him, Morrison was going to load for Temple & Pickard; the defendant told Dowling the arrangement he had made with Morrison; Dowling got him to take in part of a raft out of the water at Fredericton. The defendant did, proceeded to the mill, completed his cargo and continued to carry deals, sawed at the mill from Temple & Pickard's logs, until September, when he ceased to carry any more. The mill was shut down for a few days in September, and continued sawing until late in November. The plaintiff had to pay an increased price for carrying deals to St. John, and for want of woodboats, had to raft his deals to St. John at great expense and loss, occasioned by the defendant not furnishing his woodboats as agreed. The defendant's counsel contended that the agreement was only to carry Morrison's own deals, and not deals of any other persons, and that the carrying of Temple & Pickard's deals with Morrison's assent, was a rescission of the contract or agreement of March, 1863. The testimony of Temple was; "our logs sawed at Morrison's mill. I saw Gale he carried deals, from Morrison's mills, under the arrangement we had with Morrison. Gale complained of the price and low contract he had made with Morrison. I told him we had made an arrangement with Morrison at this rate, and he would have to carry it out. I being apprehensive of his not continuing, promised him a few cents more per thousand. I told Gale of the arrangement, and I am positive I made no new arrangement, I was afraid he was not going to complete his arrangement and I think I said I would give 60 cents." Pickard says: "Gale came there to carry under the arrangement made with Morrison. Morrison had informed me of the arrangement, and I communicated this to Mr. Gale. In speaking to Gale about carrying deals, he said he had come to carry deals from that mill; I told him there were three boats Morrison had made arrangements for. He complained

the price at 50 cents, I said if Morrison had to give others 55 cents, then Morrison was to give him the same, Gale carried under that arrangement. I objected to giving him more when I heard of Mr. Temple doing so. No contract with Gale, we shipped under the contract. I objected to pay the 60 cents as spoken by Mr. Temple. I think he said for 55 cents—Gale told me he had made arrangements with Morrison and I could carry it out; I did not make a new one."

Dowling states: "When I spoke to Gale to take in the small raft from Fredericton, I did not make any new arrangement, nor was agent for Morrison, or Temple and Pickard. I got him to take in the raft, where he got the remainder of the logs I cannot say."

Gale, the defendant, stated: "When the "Blue Jacket" came up in the spring, the mill had not commenced sawing. I came up to Fredericton, and saw Dowling, who informed me that Morrison saw sawing for Pickard and Temple, and he was doing business for them. I told him I had made a bargain with Morrison; he replied Morrison had no deals. I asked him what freight he would give; he said 55 cents. He said there is a piece of a raft here which I want you to take in. I asked if he would allow anything for taking them out of the water. He said, "No, all alike." One day Morrison said, "You are making money by carrying deals." I replied I was not, when Morrison said: "If Temple should give you $1, I will make you carry my deals according to my agreement"; and in answer to a question, he said, "I did not enquire of Morrison if he had any to send by me."

In directing the jury upon the meaning of the contract, I told them that it was to carry deals from the plaintiff's mill, and the plaintiff was to supply deals for the whole season—that it did not confine it to the deals of the plaintiff, if Morrison did not provide the necessary cargoes for the defendant's boats, he was liable for any delay in not providing cargo, and that if the defendant did not supply those boats he would be liable for any damage the plaintiff would sustain from his not doing so. The defendant's counsel asked me to leave the following question to the jury: "Did the plaintiff by his agreement with Temple and Pickard authorize them to make a new arrangement with the defendant, and that they

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should employ Gale, instead of him, Morrison, and did Temple and Pickard enter into such new agreement with Gale, with the assent of Morrison, and, if he did, there was a rescission or abandonment of the contract with Morrison—a new contract was established in which Morrison had no right, and the defendant is entitled to a verdict." This the learned Judge refused to do, there being no evidence in the cause to justify him doing so—that the contract had not been rescinded by the parties making it, or any offer by either party to do so. The defendant refusing to employ his boats carrying deals after September was a breach of the contract, for which the plaintiff was entitled to recover the increased rate he had to pay to remove his deals to St. John that fall.

I have not, during the argument of counsel, heard anything to alter the opinion I formed at the trial. There was no dispute as to the language of the contract—both parties agreed to what was in the written memorandum. Deals were carried under that arrangement until September; he was paid for carrying the deals; no question arose about that. He would have a lien on any deals he carried for his freight. If the plaintiff failed to furnish cargoes, he would be liable to defendant therefor, and this made mutual duties and obligations, and any rescission of the contract must be by the agreement of the parties, or by acts equivalent thereto. In this case the plaintiff made no change: on the contrary the defendant states Morrison said, while he was carrying the deals of Temple and Pickard, whatever they might pay, he should carry his own deals under the arrangement. Temple and Pickard and Dowling all state they made no new agreement. Gale, the defendant, does not state that any new arrangement was made. Was Morrison's using the logs of Temple and Pickard instead of Carvill's logs, which had been transferred to Temple and Pickard, a rescission of the contract, or any evidence, upon which a jury could say there was a new agreement? How was the contract rescinded? Was it by the defendant coming up before the mill commenced sawing? or going away short of ten thousand in one of his boats?—the latter was explained as being to prevent the boat shifting in St. John to discharge that quantity.

I am unable to discover any evidence, or the least scintilla of

evidence, which would justify a Judge in leaving such a question to the jury. For, unless there is some evidence upon which a jury can reasonably come to such a conclusion, I am still of the opinion I expressed at the trial, that the Judge ought not to leave the question to the jury. It would be asking them to find, not upon evidence, but upon their imagination, and I cannot see any reasonable evidence to support the defendant's contentions. *Reed v. Hogkins*[1] and *Avery v. Bowden*[2] are authorities upon this subject; and there certainly was no evidence of the repudiation of the contract on either side. In regard to rescission of contracts, Lord CAMPBELL, C. J., in *Heinekey v. Earle*,[3] says: "The contract could not be rescinded any more than entered into except with the usual consent of parties. Now I find no consent of parties." This case went to the Exchequer, and was there affirmed. WILLIAMS, J., in delivering the judgment, remarks: "But a rescission of the contract must be by mutual assent," and BARON MARTIN in *Rupliff v. Pera*,[4] lays down the same at *Nisi Prius*: "A rescission of an agreement requires an actual agreement to rescind," and COLERIDGE, J., in *Franklin v. Miller*,[5] uses the following clear expression: "The rule that, in rescinding as in making a contract, both parties must concur."

With the positive testimony of the several witnesses, and in the absence of any doubtful circumstance, or any refusal by Morrison to furnish cargo, or any request by the defendant of the plaintiff to furnish a cargo, how could I, with these plain rules of law, pursue a different course than in directing the Jury as I did, and refusing to leave such a question to them. The case of *Bradford v. Williams* in the Court of Exchequer was decided in May last, and reported in the July number of the Law Reports in the present year. That was a demurrer to a plea which, among other things, stated "that after the commencement and long before the end of September the vessel was at Bullo ready to load according to the terms of the charter party, and the Captain had exercised his option by electing to load from Gallop & Co., of all which premises the plaintiff had notice, and although all things

[1] 6 E. & B. 962.
[2] 6 E. & B. 953.
[3] 8 E. & B. 410.
[4] 1 F. & F. 300.
[5] 4 Ad. & Ell. 606.

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happened &c. necessary to entitle the vessel to be loaded in t month of Sept. by the plaintiff from Gallop & Co. Yet the plai tiff was not ready and willing to cause the said vessel to be load from Gallop & Co. in the said month, or any subsequent tin from or with Gallop & Co. according to the terms of the agre ment, but on the contrary absolutely refused so to do in violati of the terms of the charter party, and gave notice to the defenda thereof; wherefore, the defendant as he lawfully might, refus further to perform the said charter party, which are the alleg breach, &c." The Court sustained the plea as an answer to t action. In giving judgment, MARTIN, B., says: "Contracts a so various in these times that it is really impossible to argue fro the letter of the one to the letter of the other. All we can do to apply the spirit of the law to the particular case. * * The contract was for the continuous employment of the ship, a the defendant, owing to the plaintiff's refusal to perform, what w in my judgment a material part of the bargain, was unable to on as he expected carrying his freight."

BRAMWELL, B.: "The contract was for a continuous emplo ment from May, 1871, to March 1872. But in September, 187 the plaintiff in effect said, 'We do not mean to go on loading yo the defendant, for a month'; then the defendant said, 'then shall not go on under the charter party at all'; and I think he h a right to say so."

PIGOT, B.: "There was no partial breach of the contract the plaintiff, but in my judgment it struck at the root of t contract."

In the case now under consideration, where was there any r fusal on the part of Morrison, or any request of the defendant f a cargo? Evidence of any request or refusal by Morrison, anything amounting to this, is entirely wanting to bring it with the principles laid down by the learned Baron in the case th referred to.

My learned brothers FISHER and WETMORE being of a contra opinion, the rule for a new trial will be made absolute.

FISHER, J. I concur in the view taken by my brother WETMORE, and think the rule for a new trial should be made absolute.

RITCHIE, C. J., and ALLEN, J., took no part, the former not having heard the argument, and the latter having been concerned in the case while at the bar.

Rule absolute for a new trial.

CASES DETERMINED

BY THE

SUPREME COURT OF NEW BRUNSWICK

IN

HILARY TERM, XXXVI VICTORIA

HANINGTON *v.* HARSHMAN *et al.*

1873.
February

Absconding debtor—After acquired property—Whether it vests in trustees—1 Rev. Stat. c. 125.

Property acquired subsequent to the issue of an absconding debtor's warrant under the 1 *Rev. Stat.* c. 125, does not vest in the trustees.

Appeal from the decision of WELDON, J., sitting in equity, making perpetual an injunction granted at the instance of the plaintiff, a creditor of Thomas Simpson, restraining the defendants, who were trustees of Simpson under an absconding debtors' warrant, from interfering with property acquired since the issuing of the warrant. It appeared that a second warrant had issued, but no trustees had been appointed at the time of filing the Bill, and the plaintiff claimed that, as a creditor, he had a right to interpose and prevent the defendants from disposing of the after acquired property.

Feb. 6. *Dr. Parker* and *W. J. Gilbert,* for the appellants, contended that, under a fair construction of the 1 *Rev. Stat.* c. 125, all the property to which the debtor may become entitled at any time before the trustees are discharged vests in them.

A. L. Palmer, Q. C., (with whom was *D. L. Hanington*), for respondent, contended that the warrant was against the debtor's

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estate as it then was, and did not affect subsequently acquired property: *Carleton v. Leigton.*[1]

Cur. Adv. Vult.

The judgment of the Court (RITCHIE, C. J., and ALLEN, WELDON and FISHER, JJ.) was now delivered by

RITCHIE, C. J. We think the appeal in this case must be dismissed.

The simple question is whether property which has been acquired by a person some two years after proceedings have been taken against him as an absconding or absent debtor, and Trustees appointed under the Rev. Stat. c. 125, vests in such Trustees? We have no doubt that it does not. The warrant issued to the Sheriff can only attach property which the debtor owns at that time. The notice (D) which is published in the *Gazette* clearly can only apply to property of the debtor then in existence. The 14th section of the Act directs that "The estate of such debtor shall, from the time of such public notice in the *Royal Gazette*, ordered by the Judge, vest in the Trustees when appointed, and they shall take the same into their hands, with all evidences relating thereto, and sue for and recover the same in their own names, and after fourteen days notice of the time and place of sale, shall sell by public action *all such estate,* and execute all conveyances necessary to perfect such sales."

Now, what property vests in the Trustees under this section? Surely, only the property that was bound by the notice (D). The 9th section of the Act, which makes void all sales or other acts of the debtor affecting *such* estate, after publication of the notice in the *Gazette*, shews that after-acquired property was not intended to vest in the Trustees. At the time the defendants were appointed Trustees, Simpson had no right whatever to the property which the defendants now claim: so far as he was concerned, the property did not exist; because it belonged to his father. If the defendants' argument is correct, that all property which the debtor may acquire any time before the Trustees are discharged, vests in

[1] 3 Merr. 670.

them, they might, by neglecting to apply for their discharge, prevent the debtor from ever acquiring any property, even though the debts which he owed at the time the absconding debtor's proceedings were taken against him, had been fully paid and satisfied.

There is nothing in any of the other objections. The bill was properly filed to restrain the defendants from selling the property. They, at all events, have no right to object to the proceedings subsequently taken against Simpson.

Appeal dismissed with costs.

Ex parte KILBY, McLANE AND OTHERS.

1873.
February

Common Schools Act, 1871—Inspector—Appointing Trustees.

The Inspector of Schools is authorized on a proper requisition made under the 37th section of "The Common Schools Act, 1871." to appoint a new Trustee, either where a Trustee elected declines to accept the office; or where, after acceptance of it, he declines to do his duty.

This was an application for a *certiorari* to remove an assessment upon Riverside School District, in the County of Albert, made under the 44th section of "The Common Schools Act, 1871"; on the ground that the persons acting as Trustees were not legally appointed.

The affidavit of Charles A. McLane stated that he, and Edward Stevens and Abner R. McClellan, were elected Trustees of Schools for the District in January, 1872, and made declaration of office required by the 36th section of the Act; that he was appointed Secretary to the Trustees; that he continued to discharge the duties of the office till about the 1st March last; that he could not agree with the other Trustees about the purchase of a site for a school house, and in refusing to call a meeting of the ratepayers of the District to consider about providing two school houses; that he had always been ready and willing to discharge the duties of the office; that about the 6th March last, he applied to Stevens and McClellan, the other Trustees, and to the Inspector of Schools, for their consent to his resigning the office of Trustee, but the consent was not given, and that since that time he had not met

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the other Trustees, or been notified, or called upon, to attend an meeting for the transaction of any business relating to the offic of Trustee.

It appeared that a requisition, signed by ten rate-payers, date the 2nd March, 1872, was presented to the Inspector of School stating that C. A. McLane had refused to serve as Trustee o Schools, and requesting him to appoint a Trustee to fill suc vacancy. In pursuance of this requisition, the Inspector, unde the authority given by the 36th Section of the Act, appointe Alfred Kilby a Trustee in the place of McLane. Kilby did no qualify, and refused to serve, and another requisition was mad to the Inspector, dated the 22nd March, upon which he appointe James Newcomb a Trustee in the place of Kilby; subsequentl on the 28th March, Thomas McClellan was appointed in place c Abner McClellan.

The question turned upon the appointment of Kilby: if th was a good appointment, the subsequent appointments of Newcom and McClellan were not objected to.

In shewing cause against the rule, the affidavits of Abner McClellan, John Moore and William James Anderson were pr duced.

McClellan's affidavit stated that the Trustees (Stevens, McL and himself) had agreed to erect a school house; that they adop a plan, and advertised for tenders, but that McLane differed fr the other two Trustees as to the site; that on the 2nd March, (McClellan) and Stevens called on McLane to attend a meetin for the special purpose of opening the tenders and arranging th contract, when McLane positively refused to co-operate, or longe to serve in the capacity of Trustee or Secretary. In a subsequent part of the affidavit he stated that McLane formally handed over to him the books and papers of the district, again stating his determination not to serve longer as Trustee or Secretary.

Moore's affidavit stated, that he was present in McLane's shop about the 2nd March last, when McClellan and Stevens came there and requested McLane to attend a meeting of the Trustees, for the purpose of opening the tenders for the school-house contract; that McClellan offered to McLane the papers containing

the tenders, but that he refused to receive them, stating that he had decided not to act any longer as Trustee.

Anderson's affidavit stated, that in or about the 2nd March, he was present with McClellan, McLane, and Carnworth, the Inspector, and that Carnworth urged McLane to continue to act as Trustee, but that he said he would not serve any longer.

Oct. 23, 1872. *King, A. G.*, shewed cause.

C. W. Weldon was heard in support of the rule.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C. J. We think it is clearly shewn by the affidavits that on the 2nd March, McLane had absolutely refused to serve any longer as Trustee. His statement, that "*on or about* the 6th March" he applied to the other Trustees and to the Inspectors to consent to his resigning, and that since that time he had not been notified to attend any meeting of the Trustees, is quite consistent with the statements in McClellan and Moore's affidavits that he had positively refused to serve on the 2nd March.

When McLane refused to act, the Inspector was authorized by the 37th section of the Act to appoint Kilby. That section declares, that "where a district at the annual meeting fails to elect Trustees, or to fill any vacancy occurring in the Trusteeship, or, *where a Trustee declines to act*, a Trustee or Trustees shall be appointed upon the written requisition of seven rate-payers in the district, by the Inspector, who, in case of a further neglect to act, shall have power to make further appointments."

In this case, there was such a requisition as the Act requires; and admitting that that of itself would be no evidence of the refusal of a Trustee to act, it is clear in this case that McLane had not only refused to act, but it is also sworn, that he told the Inspector that he would not act: we cannot see that any further evidence of his refusal was necessary.

It was contended that a Trustee who had accepted the office, and afterwards refused to act, was liable to a penalty of twenty dollars, under the 35th section of the Act: but that such refusal

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did not authorize the Inspector to appoint another Trustee in place—that he could only do so, where a Trustee elect refuse qualify.

We think, however, that under the clear and unambigu language of the 37th section, "where a Trustee declines to act the Inspector has a right to make a new appointment, and tha makes no difference whether the Trustee has refused to make declaration of qualification, or whether he has accepted the of and acted for a time, and then refused to serve any longer. either case he *"declines to act,"* and the office is vacant. We see no distinction between the words "refusing to act" in 35th section, and "declines to act" in the 37th section,—they synonymous terms.

Rule discharged.

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February

Ex parte CARVILL.

Assessment—Common Schools Act—School purposes—Notify Council of amount required.

By Act 22 Vic. c. 37, the Mayor, etc., of St. John, were authorized "on or be the 1st April in each year," to assess the City for certain purposes. By "Common Schools Act, 1871," S. 58, the Board of Trustees was authorize determine annually the amount required for the support and maintenanc Schools, etc., in the District, and "previous to the order for assessment general City purposes," notify the Common Council of the amount requ and the Council was to cause the same to be levied and collected at the of levying and collecting other City taxes.

Held, That the Act was imperative as to the time of notifying the Common Council of the amount required for school purposes; and therefore, where general City assessment was ordered on the 5th March, but the Board Trustees did not notify the Council of the amount required for Schools till 25th April, an assessment made for the latter purpose was bad.

This was an application for a *certiorari* to remove the assessment on the City of St John on two grounds:

1st. That the general assessment was bad because the amou ordered to be assessed on the City for the General Public Hospit exceeded the amount authorized by law.

2nd. That, at the time the assessment for School purposes w ordered, the Common Council had no power to make such assess ment.

As to the first objection; it appeared by the affidavits that th

warrant, issued under the Act 23 Vic. c. 61, relating to the General Public Hospital, ordered an assessment of £592 on the City of St. John, being the City's proportion of the sum of £800. This was for the purpose of paying the interest on the Debentures issued under the Act to raise money for the construction of the Hospital.

The 9th section of the Act authorized an assessment upon the City and County of St. John, for the annual support of the Hospital, and also the sum of £420 for the annual interest on the Debentures (£7,000). By the Act 25 Vic. c. 42, reciting that the sum of £7,000 was found insufficient for the purpose of completing the Hospital, a further issue of debentures in a sum not exceeding $18,000, in addition to the £7,000 was authorized, and the Commissioners were empowered to assess for the interest of that sum in the same manner as under the former Act, and instead of assessing for the sum of £420, they were authorized to assess for $2,760, or £690, for interest.

As to the other point; the Act 22 Vict. c. 37, § 1, directs, that "The Mayor, Aldermen and Commonality of the City of St. John, shall have power on or before the first day of April in each year, to determine and direct what sum of money shall be raised and levied in the City of St. John for the following purposes": (The purposes are then stated). "The Common Schools Act, 1871," Section 58, Sub-Section 9, directs that the Board of Trustee shall, "previous to the order for assessment for general City purposes," notify the Council of the aggregate of the sums required for the support &c. of schools; and by sub-section 10, the Board shall *at the same time* notify the Council of the amount required for furnishing School buildings, &c. By sub-section 11, the Council is authorized and required, on such notification, and request under seal of the Board of Trustees, to cause to be levied and collected, "*at the time of levying and collecting the City taxes,*" a sum sufficient to yield the amount determined on by the Board, &c.

The general assessment on the City of St. John was made on the 5th March, 1872; and the notification by the Board of School Trustees that they required $60,000 for School purposes was not sent to the Common Council till the 25th April, subsequent to

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which, they, the Council, ordered a separate assessment for the amount.

Oct. 19, 1872. *A. L. Palmer, Q. C.,* and *Dr. Barker* shewed cause.

Duff, Q. C., and *C. W. Weldon,* in support of the rule.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C. J. As to the first objection, we are unable to discover under what authority the Commissioners have issued a warrant for the City's portion of £800, instead of £690; and therefore, on this ground the *certiorari* should issue, and if we are in error, as to the amount authorized, it can be shewn on the return. As to the other point:—the general assessment on the City of Saint John was made on the 5th March, 1872; and the notification by the Board of School Trustees that they required $60,000 for School purposes was not sent to the Common Council till the 25th April, subsequent to which, they, the Council, ordered a separate assessment for the amount.

This, we think, the Council had no power to do.

It has been contended that the provisions of the Act, 22 Vic. c. 37, and of the Common Schools Act, are directory only; but we think they are imperative. "Whatever the real intention of the Legislature was, we must judge of it from the words employed." In the case in which Lord CAMPBELL used these words: *Reg v. St. Leonards,*[1] he said he could not see why the enactment should be confined as he found it in the Statute. In the case before us, there seems no difficulty in discovering a most substantial reason for limiting the time within which the Common Council should have notice of the amount required to be assessed, because, in a City like St. John, it is obviously all important that the Common Council should have before them the amount to be assessed for Schools, before ordering the general assessment, in order that they may so regulate the amount of the general assessment, as not to levy more than ought fairly to be borne in one year by the citizens; and without this information, it would not

[1] 14 Q. B. 343.

be possible properly to regulate the fiscal affairs of the City; determine on the expenditures desirable to be made, and the burthens to be imposed on the City during the current year; and no doubt some equally good reason induced the Legislature to require the general assessment to be made before the 1st April, and to direct that the general assessment and the School assessment should be levied and collected at the same time.

In *Hunt v. Hibbs*[1] it was decided that an Overseer who neglected or refused to make out, sign and deliver the Burgess list to the Town Clerk, on or before the 1st September in any year, as required by the Municipal Corporation Acts, 5 and 6 Wm. 4, c. 76, § 15, and 21 and 22 Vict. c. 50 § 7, was liable to the penalty imposed by the 48th Section of the former Act, although he had made out, signed and delivered such list on or before the 5th September—the provision as to time being imperative and not directory only. In this case, MARTIN, B., says: "First, it is said that the Statute is directory only. I am of opinion that it is not. It is of the utmost importance that all these things should be done at the times the Legislature has directed. It saves disputes and expensive proceedings in courts of law. The only way to prevent that, is to require the act to be done on the exact day which the Lesislature has appointed."

CHANNELL, B., says: "I am of opinion that the time specified is essential, and ought to be strictly regarded. It is urged that the enactment is directory only; but the very object of it is, to fix the precise time."

In this case we ought not to set at defiance the plain provisions of the Legislature.

In *Mattison v. Hartt*,[2] JERVIS, C. J., says: "We must in this case have recourse to what is called the golden rule of construction, as applied to acts of Parliament, viz., to give the words used by the Legislature, their plain and natural meaning, unless it is manifest, from the general scope and intention of the Statute, injustice and absurdity would result from so construing them."

After the order for the general assessment is made by the

[1] 5 H. & N. 123.
[2] 14 C. B. 385.

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Common Council, and after the 1st April, no authority is given to them to make an independent School assessment, wholly independent of the general assessment.

The rule must be made absolute for a *certiorari*.

Rule absolute.

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February.

Ex parte McLEOD.

Assessment—Non-resident.

A non-resident, carrying on business in a Parish, is liable to be assessed on his personal estate under 1 Rev. Stat. c. 53, § 19.[1]

This was an application for a *certiorari* to remove an assessment made against George McLeod, in the Parish of Richibucto, Kent County, on his personal estate. The question in the case and the Statutes bearing upon it, are fully set out in the judgment.

Oct. 23, 1872. *King, A. G.*, shewed cause.

C. W. Weldon in support of the rule.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C.J. The only question in this case is, whether the applicant, who resides in the City of St. John, and is taxed there on personal property, is liable to be assessed in the Parish of Richibucto on personal property, by reason of his doing business in such latter Parish. The affidavits shew that the applicant was assessed in St. John, on $30,000, and in Richibucto, on $3,000, personal estate.

By the St. John Assessment Act, 22 Vic. c. 37, § 12, he was clearly liable to be assessed "on all his personal property, wherever the same may be." In the general assessment law,—1 Rev. Stat. c. 53, § 19, it is enacted that "every person carrying on business in any Parish shall be deemed an inhabitant thereof;" and every inhabitant is liable to be assessed on his personal estate.

In *Partington* v. *Attorney General*[2] Lord CAIRNS says? "As I

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[1] See 37 Vic. c. 12.

[2] L. R. 4 H. L. 122.

understand the principle of all fiscal legislation, it is this: if the person sought to be taxed, comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case may otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

Unless Mr. McLeod can repeal the 53rd Chapter of the Rev. Stat. § 19, we do not see how he is to escape assessment on his personal property in any Parish in which he may choose to do business. Residing in St. John, and doing business in Richibucto, he can no more escape taxation on his personal estate in the latter Parish, than a resident of Simonds, Portland, or any other Parish in the County of St. John, doing business in the City of St. John, can escape assessment in that City on his personal property; because the words of the 2nd section of the 31 Vic. c. 36, under which such assessments are made in St. John, are substantially the same—in effect, precisely the same—as Section 19 of the Revised Statutes before referred to.

The rule for a *certiorari* will therefore be discharged.

Rule discharged.

Ex parte McINERNEY AND OTHERS.

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February.

Assessment—Separate statements—Mixed assessments.

A warrant directing an assessment for several purposes; as, for the poor: for County contingencies; and for Schools, may be sufficient—provided the amounts required for each object are separately stated. But there must be separate assessments for each object, and if the whole are so blended together that this cannot be ascertained, the assessment is bad.

Though the warrant of assessment direct the assessors to levy more than the amounts ordered by the Sessions, the assessment will not be illegal, provided it does not exceed the amount ordered to be assessed more than 10 per cent.—under the 1 Rev. Stat. c. 53, § 21.

King, A. G., in last Michaelmas term, shewed cause against a

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rule *nisi* for a *certiorari* to remove the assessment on the Parish of Richibucto, with a view to quashing the same.

C. W. Welden was heard in support of the rule.

The objections taken to the assessment are stated in the judgment.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C. J. The objections to the assessment in this case were: 1st. That the assessment exceeded the amount ordered by the Sessions; 2nd. That the assessments for the Poor, for County Contingencies, and for School purposes should have been by separate warrants; and 3rd. That the warrant should have been issued during the Sessions.

As to the first objection—it appears that the several sums ordered by the Sessions to be levied on the Parish of Richibucto, were as follows:

For the support of the Poor,	$1115.00
" County Contingencies,	328.93
In aid of Schools,	1014.80
	$2458.73

The two first items include a charge of 11½ *per cent.*, which is probably for the expense of assessing and collecting, as authorized by 1 Rev. Stat. c. 53 § 32, though it is not so stated. The last item includes the expenses of assessing and collecting, and allowance for probable loss, as authorized by the 12th section of "The Common Schools Act, 1871."

These three sums amount to $2,458.73. The warrant of Assessment ordered the Asseesors to levy $2515.60 on the Parish of Richibucto—about $56 more than the aggregate of the amounts ordered by the sessions. It is contended that this excess renders the assessment illegal; but the 21st Section of 1 Rev. Stat. c. 53, enacts, that "every assessment made or to be made, shall be legal, if the aggregate amount thereof shall not exceed the amount ordered to be assessed, more than ten per cent." The warrant in this case is clearly within that limit; therefore we think there is nothing in this objection.

As to the second objection, after a careful consideration of the Statute, we think there should have been separate assessments for the Poor, the County Contingencies, and for Schools. The form of the warrant of assessment, (A) 1 Rev. Stat. 149, seems evidently to contemplate that a separate warrant should be issued for each subject, So, again, 1 Rev. Stat. c. 55, § 2, declares that, "Whenever the Sessions order any assessment for any purpose, the Clerk of the Peace shall make out the warrant (A) under the Seal of the Sessions, and shall forthwith transmit the same to the assessors of the several Parishes," &c.

We will not say that a warrant which directs the assessment of several sums of money for the support of the Poor, for County Contingencies, and for other purposes, would be bad, provided the several sums and objects are separately and distinctly stated in the warrant, so that the assessors may know to whom the amounts are payable, and so direct the collector in the precept. We are informed that this is the practice in some counties. However this may be, we think the assessment lists must be separate.

The heading of the Form of Assessment (B), 1 Rev. Stat. 150, is as follows :

"Assessment of the Parish of———in the County of——— in pursuance of a Warrant of the Sessions for the said County, to levy the sum of——pounds, for ———. Dated," &c.

This shews that the purpose for which the assessment is made should be stated on the face of the list, and that it should be for one purpose only. Then again, by the 24th Section of Cap. 53, the Collector of Rates is directed to give to every person assessed, if required, a written statement of "the several amounts" for which such person is assessed.

The object of this seems to be to afford information to persons of the particular amounts for which they are assessed for each object : namely, for the support of the Poor ; for County Contingencies ; and for any other purpose for which the assessment may have been ordered, to enable them to question the assessment if they think proper. This cannot be done, if only one assessment is made for the aggregate of the several sums ordered by the Sessions, as in the present case.

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There is nothing in the 12th Section of "The Common Schools Act, 1871," at variance with this view. By that Section, the Clerk of the Peace is directed to add to the sum annually voted for general County purposes, a sum equal to thirty cents for every inhabitant of the County; which sum is to be "levied and collected as other County rates"—so that, whatever rights were given to the persons assessed, and whatever duties were imposed upon the Collectors by the Revised Statutes before referred to, will equally extend and apply to this assessment under the School Act.

There is a very good reason for requiring separate assessments; as it may not infrequently happen that an assessment for one purpose may be defective, and for another free from objection—the assessment ordered for the support of the Poor may be good, and that for the County contingencies defective, for want of the approval of the Grand Jury; or *vice versa*. If the whole is included in one assessment, a defect in one portion of it, will destroy the whole.[1]

We are aware that the construction we have put upon the Statute may lead to inconvenience, and will impose additional expense upon the Counties; but we must administer the law as we find it.

There is nothing in the third objection.

The assessment was ordered by the Sessions in December, and the warrant was issued in February following. The Clerk of the Peace in issuing the warrant is only discharging a ministerial duty, and carrying out the order of the Sessions. If he improperly delays the issuing of the warrant, he may be liable to the penalty under the second section of the Rev. Stat. c. 55; but it will not affect the warrant.

For these reasons we think the rule for a *certiorari* must be made absolute.

Rule absolute for certiorari.

[1] The Court decided subsequently in the Portland case that one Assessment List was sufficient, if there were separate columns for each object.

Ex parte GILBERT AND ANOTHER.

1873.
February.

Common Schools Act 1871—Trustees—Duty—Inspector's authority—Affidavit—New matter—Filing affidavits—Leave—Quo warranto—Application for—Withholding facts.

If a requisition is made to the Trustees of Schools by the majority of the rate payers of a District, to call a special meeting for a purpose authorized by "the Common Schools Act 1871," it is their duty to call the meeting under the 28th Section of the Act; and if they refuse, the Inspector is authorized to appoint new Trustees under the 37th Section of the Act.

Leave will not be granted to file affidavits in anwer to "new matter" under the Act 19, Vic. c. 41, § 20, where the facts sought to be answered must have been within the knowledge of the party at the time he made his affidavit, and should have been stated by him at that time.

Where a party applying for a *Quo Warranto* improperly withheld material facts, which ought to have been stated in his affidavit, the rule was discharged with costs.

In last Michaelmas term, *C. N. Skinner, Q. C.*, obtained two rules *nisi* for a *quo warranto* calling on the Revd. James Neales, Joseph H. Scott and Gilbert A. Williams to shew cause why they claimed to exercise the office of Trustees of Schools in District, No. 3, in the Parish of Gagetown; the other, for a *certiorari* to bring up an assessment, for school purposes, made upon the said District under "The Common Schools Act, 1871."

Feb. 17, 1873. *Morrison* shewed cause.

C. N. Skinner, Q. C., in support of the rules.

The grounds on which the rules were obtained, the substance of the affidavits in answer, and the Sections of the Act bearing on the case, are fully stated in the judgment.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C.J. Two rules *nisi* were granted, on the application of Humphrey T. Gilbert and Henry Beattie—one for a *quo warranto* calling on the Revd. James Neales, Joseph H. Scott and Gilbert A. Williams to shew cause why they claim to exercise the office of Trustees of Schools in District No. 3, in the Parish of Gagetown; the other for a *certiorari* to bring up an assessment for School purposes made upon the said District, under "The Common Schools Act, 1871."

Both these rules depend upon the same question; namely,

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whether Messrs. Gilbert and Beattie had declined to discharge any of the duties imposed upon them as Trustees, by the Common Schools Act. It appears that they, and the Rev. James Neales were elected Trustees of the district at the annual meeting in January, 1872, and made the declaration of qualification; and their affidavits, on which the rules were obtained, state—that they have never resigned, declined, or refused to act as such Trustees, but have always been ready and willing to discharge the duties of the office, as they believe, according to the provisions of the Act.

The real question in dispute is, whether the Trustees of Schools are bound to call special meetings of the rate-payers of the District, upon receiving a requisition for that purpose, as provided by the 28th Section of the School Act; or whether the calling of such meeting is discretionary with the Trustees. That Section enacts as follows:—"Special meetings may be held, (1st) upon the call of the Trustees to fill an occasional vacancy occurring in the Board of Trustees, or for any necessary purpose other than that of voting money; and (2) upon the requisition of a majority of the rate-payers of the District for the purpose of voting money, or adding to any amount previously voted for any purpose previously authorized by this Act; notice of which meetings, specifying the objects thereof, shall be given by the Trustees by posting notices of the time and place thereof, in two of the most public places in the District, at least six days before the time of meeting."

Among the duties of the Trustees, as defined in the 45th Section of the Act, is stated "To call all meetings as provided for by this Act."

We have no doubt that, when a requisition is made to the Trustees by a majority of the rate-payers of a District, to call a meeting for one of the purposes authorized by the Act, it is their duty to call the meeting, and have no discretion in the matter. Though, in the beginning of the 28th Section, it is said that special meetings *may* be held for certain purposes; the latter part of the section declares that notice of such meetings *shall* be given by the Trustees; and the 44th Section declares that "it *shall* be the duty of the Trustees" to call all meetings, &c.

It is a general rule of construction, that where a statute says a thing may be done which is for the public benefit, it shall be con-

:d that it must be done ; the word *may* is held to be imper- : *Dwar. Stat.* 604. In *Macdougall* v. *Paterson*,[1] where the tion arose on the construction of the County Court Act, 13 14 Vict. c. 61, which provided, that, in certain cases, the t, or a Judge at Chambers, *may* direct that the plaintiff recover costs. JERVIS, C. J., said, "The word *may* is ly used to confer the authority ; and the authority *must* xercised, if the circumstances are such as to call for its :ise." The word "may" in the 38th section confers an ority on the Trustees to call a meeting, and when a requi- ı of rate-payers, such as the Act provides, is made to them, *must* exercise the authority given them. We are, there- of opinion that, when Messrs. Gilbert and Beattie refused ll the meeting, (as we are satisfied by the affidavits used ›posing the application, they did,) the Inspector was au- :zed to appoint new Trustees under the 37th section of the We have already had occasion to consider the effect of in *Kilby's* case,[2] and we adhere to what we said there.

pplication was made to us for leave to answer the statements ained in the affidavits used in shewing cause, that Messrs. ert and Beattie had positively refused to call the meeting ; that a majority of the rate-payers in the District had ap- to them to call a meeting,—on the ground that these were matters, which, by leave of the Court, they had a right to 'er, under the Act 19 Vic. c. 41 § 20.

e think the applicants ought not to be allowed to produce ıer affidavits.

was their duty to state all the facts within their knowledge, ing to the matters, at the time they made their application ; if they chose to rest their case upon the general statement they "had never resigned, declined or refused to act as Trus- " without stating any of the circumstances which gave rise e appointment of the new Trustees, (which we cannot doubt must have been fully aware of at the time they made their ication, for nobody will suppose that the Inspector would : appointed new Trustees without some ground for it,) they : now no right to a further opportunity of stating what they

[1] 11 C. B. 755.

[2] Ante. p. 219.

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ought to have stated in the first instance. Parties who withhold material facts, which ought to have been brought before the Court, are not entitled to any favors.

As the affidavit on which the rules were granted have been fully and clearly answered, both rules will be discharged; and, as to the rule for a *quo warranto*, with costs.

Rule for certiorari discharged.

Rule for quo warranto discharged with costs.

1873.
February.

McNEIL *v.* MOORE *et al.*

New trial—Jury receiving refreshments from defendant.

The jury after viewing the land in dispute went to the house of one of the defendants and had refreshments; no explanation of the charge was given by the jurors or the officer in charge of them. Held—per RITCHIE, C. J., and ALLEN and WELDON, J. J., That a verdict for the defendants ought to be set aside; per FISHER and WETMORE, J. J. That the plaintiff being aware of the fact before the trial, should have applied to the Judge to discharge the jury; and that the objection was too late after verdict.

In this case, which was an action of trespass *quare clausum fregit*, the jury, after viewing the land in dispute, went to the house of one of the defendants and had refreshments. This was stated in the affidavit on which the rule *nisi* for a new trial was obtained, and no explanation of the charge was given by the jurors or the officer in charge of them, though the case was allowed to stand over one term for that purpose. One of the defendants admitted that he gave the jury some biscuit and cheese, but denied that there was any attempt to influence them.

A. L. Palmer, Q. C., and *Tuck, Q. C.*, shewed cause.

S. R. Thomson, Q. C., in support of the rule.

Cur. Adv. Vult.

The Judges now delivered the following opinions:—

ALLEN, J. (Who remarked that the judgment he was about to deliver was also the opinion of the Chief Justice, who was absent.) I think the verdict in this case should be set aside.

It is of the utmost importance in the administration of justice

: conduct of the jurors should be free from even the sus-
of any undue influence; and where a case of improper
nication with the jurors is made out, I think, as a gen-
e, the verdict ought to be set aside without any inquiry
r the evidence supports the verdict or not; that we ought
called upon to ascertain whether the jury were influenc-
ot by the conduct of the party. The loss of his verdict
alty which the party ought to pay for his improper con-

case is very distinguishable from *Spence v. Trenholm*,[1] for
ie jury were taken to the plaintiff's house by the Deputy
almost *ex necessitate*; there was no separation of the jury,
communication with the plaintiff respecting the suit; the
Sheriff continuing with them while they remained at
ntiff's house. It was not the act of the plaintiff, taking
ors to his house; but the act of the Deputy Sheriff.
e have no affidavit of any of the jurors, or of the officer
tended them, contradicting the statement in the plain-
fidavit, or giving any explanation of it; and the first
t of the defendant Wm. Moore was very unsatisfactory.
true that the plaintiff's affidavit has been contradicted in
articulars; but the substantial part of it—that some of
ors dined, or obtained refreshment of some kind at the
of one of the defendants—is unanswered.

DON, J., concurred.

MORE, J., observed that he did not see any reason to
rom the decision of the Court in *Spence v. Trenholm*, and
t the rule should be discharged.

ER, J., was of the same opinion.

Rule absolute for new trial.

HERBERTSON v. CUNNINGHAM.

Deed—Easement—Mill-pond—Soil.

of a piece of land, "together with the mill privilege, saw-
and erections belonging to the same; and also the pond or
ge above the said mill," conveys no right to the soil of the
ond, but only an easement to dam the water and overflow
nd for the purposes of the mill below.

pass *quare clausum fregit* tried before WELDON, J., at the

[1] 1 Han. 77.

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HERBERTSON v. CUNNINGHAM.

Charlotte Circuit The *locus in quo* was the soil forme covered by a mill-pond.

The plaintiff in this case claimed whatever property was c veyed by the Sheriff of Charlotte County to James Linton, by deed dated 14th March, 1846, which describes the prope seized by the Sheriff as "all that certain piece or parcel of la situate in the Parish of St. Patrick, commencing at the west side of the road leading from St. Andrews to Bocabec Ridge called ; thence in a westerly direction along the south side of dam, crossing the said Richard & Jacob Turner's mill stre sixteen rods ; thence southerly five rods ; thence easterly sixt rods ; thence northerly five rods to the place of beginni Together with the mill privilege, saw mill, lath mill and e tions belonging to the same ; *and also, all the pond or flowage al the said mill*, with the right of a footway or path on both side the same, as far as the said Jacob Turner's land extends :" a another piece of land commencing at the eastern corner of same, and extending up stream, five rods. The deed grants Linton, all the estate, right, title, &c. of Richard Turner a Jacob Turner, of, in, and to "the said piece or parcel of la hereinbefore described"—*habendum*—"the said pieces or parc of land, and all and singular other the premises hereby grant released and confirmed, or intended so to be, with each every of its appurtenances," to the grantee, his heirs assigns for ever.

On the 28th March, 1846, the Sheriff of Charlotte conveye Wellington Cameron, certain property seized under an execu against Richard Turner and Jacob Turner. The deed rec that the Sheriff had seized (*inter alia*) all that certain lot or p cel of land, situate in the Parish of St. Patrick, known as lot N 6, granted to Mark Turner, "bounded South by lot No. 5, owne by Daniel Hanson and John Braddock, North by Eliphalet Ha son's land, East by the land of James Turner and John M Mullin, and West, by the East end of the grants to the late Clark and William Smith—containing 200 acres more or les "with the exception of one half acre containing Richard Jacob Turner's mill privilege, so called, with the pond flowage attached to it, which was conveyed to one James I ton, Jr., on the 14th day of March instant."

verdict was found for the plaintiff, with leave reserved to efendant to move to enter a nonsuit. Pursuant to such , *Grimmer*, in Hilary term 1872, obtained a rule *nisi* for a nit, or for a new trial against which on—

t. 10. *Geo. D. Street* shewed cause, citing *Attorney General ipham*;[1] *Burke v. Niles.*[2]

immer, in support of the rule, cited *Ang. on Watercourses* §§ 44.

Cur. Adv. Vult.

e judgment of Court was now delivered by

RCHIE, C. J. The defendant in this case has acquired ever property was conveyed to Wellington Cameron by the ff's deed of the 28th March, 1846, and it appears to be ad- d that, unless the *locus in quo* was conveyed by the Sheriff nton, it would be included in the bounds of Cameron's The question then is, whether the words "*Pond or Flow-* conveyed the land, or only an easement over it?

e word "Pond," in one of its significations, means a col- on of water raised in a river or stream by a dam for the ose of propelling mill wheels, and these artificial ponds are l mill ponds. In this sense the term "Pond" was un- ionably used in the Sheriff's deed; and we think the land r the pond was not intended to be conveyed, but only an nent or right to dam the water, and overflow the land, by cial means, as it then was, for the use of the mill below,— his is made, we think, quite apparent by the addition of words "Or flowage," shewing distinctly the sense in which erm "Pond" was used.

Rule absolute for nonsuit.

NILES v. BURKE.

1873.
February.

n Grant—Construction—Bounded by lake—Margin—Bound- aries—Declarations by person in possession—Evidence—Surveyor—Reference to plan—Loss of field notes.

nt of land bounding on a lake, conveys the land to the margin y, and not to the centre of the lake.

[1] 1 Jur. N. S. 505. [2] 2 Han. 166

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NILES
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Declarations respecting the boundaries of land by a person in possession, and under whom the defendant claims, are evidence against him in an action in which boundaries of the same land are in dispute.

A surveyor who had made a survey of land by direction of the Government, may refer to a plan of it made by himself shortly after the survey filed in the Crown Land office, and upon which survey a grant of the land issued, for the purpose of enabling him state the courses and distances which he ran, his field notes the survey having been lost.

Trespass *quare clausum fregit* tried before WELDON, J., at the Westmorland Circuit in January last. The defendant was the grantee of a lot of land described as bounding on Round Lake the plaintiff held under a subsequent grant of the soil of the lake, and the principal question in the case was, whether the defendant's grant by its terms extended to the centre of the lake. Verdict for plaintiff.

On a former day of this term, *Landry* moved for a nonsuit pursuant to leave reserved, or for a new trial. He contended that the defendant's grant extended to the centre of the lake, and that, therefore, the Crown had no power to make the second grant. Where one owns land bounding on a lake, he has a right to follow the water as it recedes as far as the centre. In support of the motion for a new trial, it was also contended that evidence of declarations, of a former proprietor, under whom the defendant claimed, respecting the boundaries of the lot in question were improperly admitted ; and also that a surveyor, who had made a survey of the land by direction of the Government, was improperly allowed to refer to a plan made by himself shortly after the survey, filed in the Crown Land office, and upon which survey a grant of the land issued, for the purpose of enabling him to state the courses and distances which he run, his field notes of the survey having been lost.

(RITCHIE, C. J., referred to *Horne v. Mackenzie.*[1])

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C J. We see no ground for interfering with the verdict in this case. The claim set up by the defendants,—namely that the grant under which they hold, extend to the centre of

[1] 6 Cl. & F. 628.

the lake—has already been virtually decided in case of *Burke v. Niles.*[1] The Court held there, that the lots described in the defendant's grant as bounded on Round Lake, extended to the margin or edge of the Lake, and that the grant under which the present plaintiff claims, convey to him the soil of the lake. That necessarily excluded any right of the grantees bounded on the lake, to extend to the centre of it, and agrees with the rule as laid down in *Angell on Watercourses*, § 41, and *Washburn on Real Property*—and we know of no English authority to the contrary—that, where land is conveyed bounding on a lake the grant extends only to the water's edge.

Rule nisi refused.

There is nothing in either of the objections to the admission of evidence.

GRAHAM v. GILBERT.

1873.
February.

Money had and received—Action for—Where money under distress is paid for rent —Voluntary payment.

Plaintiff held land as tenant of defendant under a lease, and by an agreement outside of the lease, he was to do some ditching on the land, which was to be allowed him as a payment on account of the rent. The ditching was done during the summer, and the defendant afterwards issued a distress warrant for half a year's rent, due on the 1st May previously, which rent the plaintiff paid.

Held. That the amount of the ditching was a matter entirely in the knowledge of the plaintiff, and as he had not given the defendant any account of it before the distress issued, he had no means of crediting it on the rent; and that, after submitting to the distress, the plaintiff could not maintain an action to recover back the value of the ditching.

The plaintiff held land as tenant to the defendant under a lease, and by an agreement outside of the lease he was to do some ditching on the land, which was to be allowed him as payment on account of the rent. The ditching was done during the summer, and the defendant afterwards issued a distress warrant for a half-year's rent, due on the 1st May previously, which rent the plaintiff paid. The plaintiff now sued to recover, as money had and received, the amount which should have been allowed him for the ditching.

[1] 2 Han. 166.

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GRAHAM v. GILBERT.

At the trial a verdict was found for the plaintiff, and a rule *nisi* was afterwards obtained—pursuant to leave reserved—to enter a nonsuit, the grounds on which the same was obtained being fully stated in the judgment.

October 25, 1872. *A. L. Palmer, Q. C.*, shewed cause.

S. R. Thomas, Q. C., in support of the rule.

The following cases were cited : *Marriot v. Hampton* ;[1] *Gly v. Thomos* ;[2] *Parker v. Exeter Railway Co.* ;[3] *Smith v. Sleap* ;[4] *Wilson v. Cameron* ;[5] *Higgs v. Scott* ;[6] *Gulliver v. Cosens.*[7]

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C. J. This was an action brought to recover a number of items of account, all of which, however, appeared to have been covered under the terms of a lease under seal, and not recoverable in this action, except one item for ditching, which by an agreement outside of the lease the plaintiff was to do on the demised premises, and for which he was to receive credit as a payment *pro tanto* on his rent.

The plaintiff's contention is that some portion of this work was done before the first May, and the amount of the work so done should have been credited by the defendant on the rent falling due on that day ; but, instead thereof, he distrained for and recovered the whole amount of the rent, and the plaintiff now claims to recover as money had and received by the defendant, the amount which he alleges the defendant received for the rent beyond what he was entitled to, had he duly credited the amount of the work done in ditching.

The defendant's answer to this is, that the ditching was not all done till after the first of May, that it was an entire contract, and that, till the work was finished and an account of the amount or value of the ditching done was rendered, he could not claim credit

1 2 Sm. L. C. 458.
2 11 Exch. 870.
3 6 Exch. 702.
4 12 M. & W. 585.
5 1 Kerr 542.
6 7 C. B. 63.
7 1 C. B. 788.

for it on account of the rent, as the defendant had no means of ascertaining the amount and value of the work, which was within the knowledge of the plaintiff alone, and therefore the defendant could not make the deduction, and that the rent up to the first of May having been recovered by distress, the plaintiff cannot now recover any portion of it back, as money had and received to plaintiff's use; and with this we agree. If the ditching in this case was a payment, the plaintiff in this action should have replevied and pleaded no rent in arrears as to so much of the rent as the ditching done amounted to and paid. Having a knowledge of all the facts, he should not have neglected to avail himself of the means of defence open to him. In this view, the payment, though under a distress, was in the nature of a voluntary payment, and so not recoverable back. Thus it was held in *Knibbs v. Hall*[1] that, when a party threatened with a distress for rent, pays money when he might legally have defended himself, it is not a payment by compulsion, and can neither be recovered back, nor set off against another demand. So in *London v. Hooper*,[2] an action will not lie to recover back money paid for the release of cattle *damage feasant* though the distress was wrongful.

So, where, rent being in arrear, the landlord takes goods of the tenant as a distress, and claims more than the amount of such arrears, and the tenant, in order to regain possession of the goods, pays the amount demanded, he cannot afterwards maintain an action to recover back the money so paid by him in excess of the amount really due: *Glynn v. Thomas*;[3] *French v. Phillips*.[4]

Independent of all which, in this case the ditching was in progress on the first of May, and the quantity done and amount due at that time was not then ascertained, nor does it appear to have been since. The amount was never adjusted between the parties, nor was any account ever rendered or claim made by the plaintiff for the ditching up to the first of May. The knowledge of what had been then done was solely with him; and, until some account or information was furnished the defendant, it would have been quite impossible for him to have given the plaintiff any credit. There-

[1] 1 Esp. 84.
[2] 1 Cowper 414.
[3] 11 Exch. 870.
[4] 2 Jur. N. S. 1169 Exch.

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fore, under all these circumstances, we think no case was made out against the defendant, and the plaintiff should have been non-suited.

Rule absolute.

HANINGTON *v.* STEWART.

1873.
February

County Court—Right to stay proceedings—City Court—Interlocutory order—Appeal.

The County Courts and the City Court of St. John, being both Courts of limited jurisdiction, and in suits for the recovery of certain debts, of concurrent jurisdiction; a Judge of the County Court has no power to stay the proceedings in a suit brought to recover a debt in that Court, on payment of the debt without costs, on the ground that the suit might have been brought in the City Court, where the costs are less than in the County Court.

Quaere, Whether there is any appeal to the Supreme Court under the Act 30 Vic. c. 10, from an interlocutory order of a Judge of a County Court; but an order absolutely to stay the proceedings in a suit, is a final decision, and may be appealed from.

Appeal from a decision of the Judge of the King's County Court, ordering a stay of proceedings in this action, upon payment of the debt without costs, on the ground that the suit might have been brought in the City Court of Saint John.

February 13, 1873. *D. L. Hanington* for the appellant.

Wm. Jack, Q. C., for the respondent, relied on *Stutton Bamcut.*[1]

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C. J. This was an appeal from the decision of the County Court Judge for the County of King's. The action was brought to recover $24. Defendant applied to Judge WATTERS to have all proceedings stayed, and the cause settled on payment of the amount in dispute without costs, on the ground that the plaintiff might have brought his action in the City Court of St. John, in which Court it is alleged the costs are less than in the County Court. The Judge made the order asked for, and so disposed of the suit. We are now asked to set aside this order, and enable the plaintiff to proceed in the Court below and recover the amount claimed by him, with the costs which the law gives the

[1] 3 Exch. 831.

successful party in that Court. Two objections have been urged: 1st. That there is no appeal from the County Court to this Court in interlocutory orders or proceedings, but only from a final decision the final determination of a suit. If this were so, which we by no means affirm, the decision in this case was a final disposition of the cause.

2nd. It was said that the County Court Judge had a discretionary power to make the order he did; but we think the Judge had no discretion in the matter. The Court over which he presides being a Court of limited jurisdiction, he has no jurisdiction beyond what the Legislature has given, and we can discover no authority for taking from the plaintiff his costs because he had chosen to select the County Court in preference to the City Court. They are both Courts of limited jurisdiction, and, with respect to the subject matter of this suit, of concurrent jurisdiction; and the party plaintiff had a perfect right to select whichever he chose; and we cannot see that the County Court had any more right to stay the proceedings on payment of the debt, without costs, than the City Court would have had if the suit had been brought there instead of in the County Court. The mere fact of the costs being more or less in one than in the other of two Courts of limited, concurrent jurisdiction, gives no authority to one or the other to deprive suitors of the costs the law has given them. A suitor may have very good reasons for selecting one Court in preference to the other, but of this neither Court has any right to enquire, because the law gives him his choice, and of this the Court has no authority to deprive him.

The case cited has no bearing on this point, because there is no analogy between that case and this. The case cited merely decided that the jurisdiction of the Superior Courts to stay proceedings in actions brought in those Courts for sums under 40s., when the action might have been brought in an inferior Court, was not taken away by the 9 and 10 Vic. Chap. 95, or the 10 and 11 Vic. Chap. 71. (City of London small debts Act.)

Appeal allowed with costs.

1873.
February

WOOD v. THE CARLETON BRANCH RAILWAY COMPAN

Railway Company—Authority to cut down the level of stree Plaintiff's acquiescence.

The Act 33 Vict. c. 39 incorporating the "Carleton Branch Railway Compar authorized them to locate and construct a railroad from deep water in Carle to the E. & N. A. Railway, investing them with all the powers and privile necessary for the purpose; among others, the right to purchase, take and h as much land as might be necessary for the location and construction of railway, provided that, in all cases they should pay for the land, etc., tal and used. The 12th section of the Act authorizes the Company to run th line of railway through and upon any of the streets, wharves, places or squar as also through all unleased lands belonging to the City of St. John. In mak the railway, a contractor, under the Company, cut down a street in Carlet on which the plaintiff's house fronted, to a depth of about twelve feet, rend ing the approach to his house difficult, and materially injuring the value of property. The plaintiff had been employed as a laborer by the contractor, worked on a part of the street so cut down.

Held, 1st. That the 12th section of the Act gave the Company no authority cut down or alter the level of the street.

2nd. That the plaintiff, by having worked on the street, was not estopped f maintaining an action for the injury to his property, the work having done by the defendants under a claim of right, and not in consequence of consent or authority given by the plaintiff.

Action on the case. The defendants were incorporated by of Assembly 33 Vic. Chap. 39—and by Section 1, authorized locate and construct and finally complete, alter, and keep in rep a Railroad, &c., from deep water, at any point in Carleton, on western side of the harbor of St. John, over the most practica route to the European and North American Railroad for extensi from St. John westward, at or near Fairville," &c., and by t same section the Company were "invested with all the powe privileges and immunities which are or may be necessary to car into effect the purposes and object of this Act, and for this purpo shall have the right to purchase or take and hold so much of th land and other real estate of private persons or corporations, a may be necessary for the location, construction and convenien operation of said Railroad, and Stations connected therewith— Then follows authority to take materials, &c., with, however, proviso that the lands taken shall not exceed a certain width; an a further provision, "That in all cases the said Corporation sh pay for said lands, estates and materials, so taken and used, suc price as they and the owner or respective owners may mutual agree upon;" and in case the parties shall not otherwise agre the damages to be paid by the Company are to be ascertained

provided by 27 Vic. Chap. 57; and it is declared that the lands taken shall be held as lands taken and appropriated for highways; all applications for damages to be made within two years from the time of taking the land, and not after. By the 12 Section it is enacted that the Company shall have power "to run their line of Railway *through and upon* any of the streets, wharves, places or squares, as also *through all* unleased lands belonging to the City of St. John," also to take and hold for the purpose of their Railway, a portion of the Mill Pond belonging to the City of St. John (therein described); also the right to extend their line to deep water at Harbor line, &c., provided that the Company shall pay to the City Corporation, to go to the credit of the Westside Common Land Fund, the cost of any wharf or erection on a certain part of the therein described land.

In making their road, the defendants cut down or lowered the levels of Ludlow and Germain Streets in Carleton, in the City of St. John, for the purpose of enabling them to run their road through Germain Street, the two streets crossing each other at right angles the one to the other; and the plaintiff owned a lot of land on the corner of Germain and Ludlow Streets, on which his dwelling house was erected.

The excavation through Germain Street was some 14 or 15 feet from the house, and sufficiently deep to leave a ridge in front of the house, preventing access thereto and materially depreciating the value of the property, and the present action was brought to recover damages therefor. At the trial the jury estimated this damage at $350, and found a verdict for plaintiff for this amount.

In Trinity term, 1872, Dr. *Barker,* on behalf of the defendants, obtained a rule *nisi* for entering a nonsuit, pursuant to leave reserved, on two grounds—1st. That the defendants in making the excavation in front of the plaintiff's house did not exceed the authority given them by the Legislature, and the cutting being necessary, and they having been guilty of no malice or negligence in their operations, the plaintiff cannot recover, even though he may have sustained an injury, as the Statute has given him no compensation or remedy. 2nd. That the plaintiff assisted in making the cutting and doing the work which caused the injury

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complained of; and therefore he cannot maintain this action. *Dunn v. Birmingham Canal Co.;*[1] 1 *Redf. Railways* 294; *Regina v. Eastern Counties Railway Co.;*[2] *Hammersmith Railway Co. v. Brand;*[3] *Vaughan v. Taff Vale Railway Co.;*[4] *Rex v. Pease;*[5] *Boulton v. Crowther;*[6] *Cast Plate Co. v. Meredith;*[7] *Regina v. Vestry of St. Luke's.*[8] were cited.

October 25. *Duff, Q. C.,* shewed cause, citing *Parker v. Great Western Railway Co.;*[9] *Priestly v. Foulds.*[10]

Dr. *Barker,* in support of the rule.

Cur. Adv. Vult.

The judgment of the Court (RITCHIE, C. J. and ALLEN, WELDON and FISHER, JJ.) was now delivered by

ALLEN, J. Two points were made by the defendants in this case which we are called on to determine; 1st. The defendants in making the excavation in front of the plaintiff's house did not exceed the authority given them by the Legislature, and the cutting being necessary, and they having been guilty of no malice or negligence in the operations, the plaintiff cannot recover, even though he may have sustained an injury, as the Statute has given him no compensation or remedy. 2nd. They contend that the plaintiff assisted in making the cutting and doing the work which caused the injury complained of, and therefore he cannot maintain this action.

If power was given to the Company to alter and lower this street and they acted strictly within the power, and exercised it with discretion and in a reasonable manner for the accomplishment of the objects for which the privilege was granted, using reasonable care that no unnecessary injury or damage should be done, then, though the plaintiff's property may have been injuriously affected, he has no remedy against the Company, as no compensation is provided therefor by the Act. No Court can treat that as a wrong which the Legislature has authorized, and the person sustaining a loss by the doing of that act is without remedy, in all

[1] L. R. 7 Q. B. 258, 260.
[2] 2 Q. B. 347.
[3] L. R. 4 E. & Ir. App. 171.
[4] 5 H. & N. 684.
[5] 4 B. & Ad. 30.
[6] 2 B. & C. 706.
[7] 4 T. R. 794.
[8] L. R. 6 Q. B. 572.
[9] 7 M. & Gr. 288.
[10] 2 M. & Gr. 194.

cases where the Legislature has not thought proper to provide for compensation, as was said in *Dunn v. Birmingham Canal Co.*,[1] "The cases upon this point are numerous, and the law is thoroughly settled."

There is no doubt in this case that the plaintiff's property has been injured and depreciated in value by lowering the level of the street so as to impede access to the premises, as in *The Queen v. Vestry of St. Lukes.*[2]

How then is an Act such as this to be construed? In 7 M. & G. 253, it was held that Railway Acts are to be construed strictly against the parties obtaining them, but liberally in favour of the public; and, in *Scales v. Pickering*,[3] that ambiguous words in an Act of incorporation of a Public Company are to be construed against the Company and in favour of private property. In *Priestly v. Foulds*,[4] COLTMAN, J., says: "This is an enactment (an Act authorizing the making of a navigable canal) for the benefit of a particular class of persons, and ought to be construed so as to protect the public against inconvenience. The words of the Act must be considered as the language of the Company, which ought to be construed *fortius contra proferentem*."

In *Lamb v. North London Railway Co.*,[5] SIR C. J. SELWYN, L. J., says: "In cases like that now before the Court (construction of a Railway Act) the burthen lies on those who seek to take the property of others against their will, to show that a compulsory power, enabling them so to do, has been conferred upon them by Parliament: such powers are not to be created or extended by doubtful implication, but, as observed by Lord COTTENHAM in *Webb v. Manchester and Leeds Railway Co.*,[6] it is the duty of the Court to keep these Corporations, which possess such extraordinary powers, strictly within the limits of those powers."

Reading this Act by the light of those cases, we think the right conferred on this Company by the Act to pass "through and upon any streets, &c.," must be strictly construed, and gave the Company no right to substantially alter, raise, or lower any streets, &c., so as to destroy the access to property facing on the streets,

[1] L. R. 7 Q. B. 244.
[2] L. R. 6 Q. B. 573.
[3] 4 Bing. 448.
[4] 2 M. & G. 194.
[5] L. R. 4 Ch. Ap. 526
[6] 4 M. & Cr. 120.

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through which the Railway should pass; that there is nothing in the words, "Through and upon any of the streets," which conveys any permission to alter the streets by filling them up or cutting them down; but, on the contrary, both words appear to us to indicate the contrary.

The first, "Through," is only applicable to the subject matter as denoting a passage, as passing through a gate, avenue, or street; and the latter "Upon," in its primary signification, meaning resting or being on the top or surface, and is equivalent to "on, above, over," and therefore conveys simply the permission that the Company may go through, that is, on the surface of any of the streets. Would it not be a forced construction or interpretation of those words, to hold them equivalent to the words, "Alter, raise, or lower any street, &c., for their convenience," which were used in 2 Q. B. 347, and that they gave permission to this Company to select what streets they pleased, and deal with them as best suited their purposes, regardless of the convenience or rights of the public generally, on the one hand, or of property owners on the other; and that, too, without any control by the officers of the public, or any right to receive compensation for substantial, and, it may be, ruinous injuries caused to individuals. Before a private Company can legally justify the exercise of such extraordinary powers, we think they must show they had the right by language too clear and unequivocal to admit of a doubt. So far from this being the case, we think the Legislature intended to give no more, other or greater right to this Company than the right to utilize the streets, &c., for the purposes of their railway when they could do so by laying their rails through and upon the surface of any such streets, &c. We can discover no authority beyond this to interfere with either public or private rights; and, therefore, in cutting down the street as they did past the plaintiff's property, they exceeded their authority, and rendered themselves liable to the plaintiff for the damage occasioned thereby. If this is so, we have, then, to consider whether the plaintiff assented to, or assisted in the act of cutting down the street in such a way as to estop him from complaining of, or recovering damage for the injury done. There can be no doubt, as was said by Lord COCKBURN in *Dunn v. The Birmingham Canal Company*, that "no action at law

can be maintained for an injury which has been brought about by the wilful and intentional act of the party complaining, or its proximate and immediate cause, such act having been done by him with his eyes open, in other words, with a knowledge that the injury would be the probable consequence of the act so done by him."

In this case, the defendants contracted for the doing of this work, a sub-contractor actually did it, and the plaintiff worked under him as a common laborer, and no doubt may have, and under the evidence, probably did some work on the street immediately in front of his own property; but his consent that the street should be cut down was neither sought for, nor given, because the defendants claimed then, as now, that they had legal authority for what was being done. The defendants were in no way influenced in their conduct by the act of the plaintiff, nor did they in any way profess to be governed by any consent express or implied; and if there was an acquiescence in this case, it was clearly on the supposition that, in cutting down the street, the defendants were acting under legal authority; but which, as we have seen, did not exist, and, therefore, it would be most unreasonable to deprive the plaintiff of his remedy.

Mr. Hilliard, in his work on Torts, Vol. 1, page 192, says: "So the acquiescence in a trespass, of one who has been deceived by a pretence of legal authority, is not such consent as to affect his remedy at law;" and on page 191: "But a plaintiff will not be held estopped except by clear and unequivocal acts of adherence or acquiescence, and to which the defendant was party or privy." There is nothing to shew in this case that the defendants ever knew till the trial that the plaintiff had ever worked on the street.

In *Howard v. Hudson*,[1] "There is no estoppel unless it appears, affirmatively, that it was intended that the party for, or to whom it was made, should act on the faith of it, and that he actually did so act."

In *Heane v. Rogers*,[2] BAYLEY, J., says: "There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct are evidence, and strong evi-

[1] 2 El. & Bl. 1.

[2] 9 B. & C. 586.

1873.

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dence, against him; but we think he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition. In such a case a party is estopped from disputing the truth with respect to that person and that transaction."

In *Newton v. Liddiard*[1] Lord DENMAN says: "The general doctrine laid down in *Heane v. Rogers,* that a party is at liberty to prove that his admissions were mistaken or untrue, and is not estopped by them, unless another person has been induced by them to alter his condition, is applicable to mistakes in respect of legal liability as well as in respect to facts."

How different is this case from *Liggins v. Inge,*[2] where plaintiff's father by oral license permitted the defendant to lower the bank of a River, and make a weir above plaintiff's mill, whereby less water thereupon flowed to plaintiff's mill, in which it was held, plaintiff could not sue defendant for continuing the same. In that case, TINDAL, C. J., says: "We think after he has once clearly signified such relinquishment, whether by words or acts, and suffered other persons to act upon the faith of such relinquishment, and to incur expense in doing the very act to which his consent was given, it is too late then to retract such consent, or to throw on those other persons the burthen of restoring matters to their former state and condition."

This case is almost precisely the same as *Smith v. Crandall,*[3] where it was held that "A., the owner of land through which a river flows, is entitled to recover damages in an action on the case from B., the owner of the land adjoining, situate lower down the stream, for obstructing the natural course of the river by mill-dam within the land of B., which causes the water to overflow A.'s land; and that the circumstance of A.'s being present while the work was going on, and himself assisting as a laborer in the employ of B., is not conclusive evidence of a license so as to estop A. from maintaining such action; but is for the consideration of the jury, in connection with the other circumstances of the case,

[1] 12 Q. B. 927.
[2] 7 Bing. 682.
[3] 1 Kerr. 1.

particularly such as tend to show that A. could have not been aware of the effect of the dam."

We think the mere fact of the plaintiff having as a laborer worked on the street while it was being cut down, and possibly before his own property, under a sub-contractor, was not such a consent or acquiescence in the acts of the defendants, or such a relinquishment of his own rights to recompense; that there was no evidence that the defendants did the act under any such pretence; nor was there the slightest evidence of any intention on the plaintiff's part to confer any right on the defendants, or that the defendants acted on the faith of any such acquiescence and sanctioning; nor was there anything in the evidence to warrant the conclusion that the plaintiff, by words or by his conduct, intimated that he consented to the act being done, and would offer no opposition to it, and thereby induced the defendants to do that from which they otherwise might have abstained; if there was any sanction by the plaintiff, we think he was deceived by a pretence of legal authority on the part of the defendants.

Rule discharged.

Ex parte MAHER AND OTHERS.

1873.
February

Assessment—Party objecting to—Onus of proof—Assessment for interest on debentures "to be issued"—Legality of.

A Town Council, authorized by law to assess for interest payable on debentures "issued" by the Board of School Trustees, has no power to make an assessment for interest on debentures "to be issued."

A party objecting to an assessment is bound to show *prima facie* that it is wrong.

A rule *nisi* having been obtained on the application of Henry Maher and others for a *certiorari* to remove the assessment on the Town of Portland—

King, A. G., Fraser, and *Dr. Barker* shewed cause in last Michaelmas term.

Duff, Q. C., and *C. W. Weldon* were heard in support of the rule.

1873.
Ex parte MATTER.

As the objections taken to the assessment, on which the judgment is based, are there stated, it is unnecessary to refer to them here.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C. J. A number of objections were taken to the general assessment of the Town of Portland, which we think were answered by the affidavits produced on shewing cause. As to the assessment for the Public Hospital under the Act 23 Vic. c. 61, we quite agree with Mr. *Weldon* that the materials before the Court are not sufficient to enable us to form any opinion whether the amount assessed is right or wrong; and it is the duty of a party objecting to an assessment to shew *prima facie* that it is wrong. The objections to the general assessment therefore fail.

There is one objection to the School assessment which, as at present advised, appears to be fatal.

In the estimate of the amount of $17,000 required for the maintenance, &c., of schools sent in by the Board of Trustees to the Town Council on the 22nd April last, is included several sums for interest on Debentures *"to be issued,"* for repairs, and for land and buildings.

By the 58th Sect. of "The Common Schools Act, 1871," sub-sections 5 and 6, the Board of Trustees is authorized to borrow money for the purchase of lands, and for the erection and repair of buildings. By sub-section 7, to enable the Board to borrow money, it may issue Debentures in such form, and for such sums as may be decided on, redeemable in twenty-five years, with interest payable half-yearly.

By sub-section 9, the Board of Trustees is directed to notify the Council of the sums required for the yearly support of the Schools, including "the interest payable on Debentures issued by the Board."

Until the Debentures are issued and a debt created, how can an assessment be made for interest? We are asked to read the word "issued," as if the Legislature had said *"to be* issued." But what right have we to depart from the plain language of the

Act, and give a construction to the words used, entirely at variance with their natural meaning, and also, as we think, opposed to common sense, for it cannot be supposed that the Legislature ever intended to vest a power in the Trustees to ask an assessment to raise interest on Debentures *in prospectu,* and which, perhaps, might never be issued. When the Trustees have borrowed money under the authority given in the Act, and contracted a debt, then, and then only, can they ask for an assessment to pay the interest. If, from any cause, the debentures should never be issued, what is to become of the money which has been assessed and levied to pay the interest upon them? The Trustees may have fully intended to issue the debentures when they sent in the requisition, but the Act gives no authority to assess for interest in such a case. The power given by the Act must be strictly followed, and no tax can be levied for any purpose not authorized by the Legislature.

In *Richter v. Hughes,*[1] Trustees were authorized to borrow a sum of money on interest, and to assess to pay the interest, and certain salaries mentioned: they borrowed a larger sum than the Act allowed, and it was held that a rate made to pay the interest on the whole sum borrowed, was bad. The language of HOLROYD, J., in that case is very applicable here. He says: "The money to be raised was to be applied to the payment of money already actually borrowed, or then actually due, and, therefore, could not be for payment of salaries afterwards to become due, and not due at the time of making the rate." So here, the money to be raised was to be applied to the payment of the interest of money actually borrowed, or to debentures actually issued.

We think there is nothing in the objection that the Town Council did not sanction the issue of Debentures to the amount of $17,000. They sanctioned it most effectually when they ordered an assessment for it.

Rule absolute for certiorari.

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[1] 2 B. & C. 499.

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February

DOE DEM. DONOHUE *et al.* *v.* McGARRIGLE AND WIFE.

Deed—Description—Rejection of part—Construction.

D. conveyed to his daughter a piece of land in Saint John, described as a on the corner of Saint James and Sidney streets, now in the occupation of P. and wife, (the defendants) subject to any charge or mortgage now against same. At the time of making this conveyance D. owned parts of two lots 1085 and 1086 adjoining each other, and purchased at different times. 1086 was situated on the corner of Saint James and Sidney streets, and occupied by the grantor's daughter and her husband P. M., and was also ject to a mortgage given by the grantor. No. 1085 was situated altogether Saint James street and was occupied by tenants of D., who received the re his daughter having only the use of a wood shed and outhouse thereon common with the other tenants.

Held, per RITCHIE, C. J., and ALLEN and WETMORE, J. J., that no part of description in the deed could be rejected; that the lot No. 1086 exactly fi and corresponded with the description in the deed, and, therefore, that lot passed by the deed.

Per WELDON and FISHER, J.J. That the words of the deed coupled with the rounding circumstances, shewed an intention to convey both lots to defendant.

Ejectment brought to recover an undivided interest in Western half of lot 1085 in the City of St. John. At the tr before FISHER, J., at the St. John Circuit in August, 1871 verdict was entered for the defendants by consent, leave bei reserved to the lessors of the plaintiff to move to enter a verdict an undivided two-fifths part of the land in dispute. The mater facts in the case, as well as the contention of the parties, are fu stated in the judgment delivered by the majority of the Court.

In Michaelmas term, 1871, *S. R. Thomson, Q. C.*, mo accordingly to enter a verdict for the plaintiff, citing *Lister Pickford;*[1] *Webber v. Stanley.*[2] Rule *nisi.*

April 23, 1872. *Duff, Q. C.*, shewed cause.

S. R. Thomson, Q. C., in support of the rule, cited *West Lawday.*[3]

Cur. Adv. Vult.

The judgment of a majority of the Court (RITCHIE, C. J., a ALLEN and WETMORE, JJ.) was now delivered by

ALLEN, J. The lessors of the plaintiff claim title to the la in question, as heirs of Patrick Donohue, who held it under a c veyance from Thomas G. Hatheway, dated September 8, 1837, which it was described, as "All that certain lot, piece and par

[1] 34 Beav. 576.
[2] 16 C. B. N. S. 698.
[3] 11 H. L. C. 375.

of land, situate in Duke's Ward, in the City of St. John, at the corner of Sidney and Stormont streets, and bounded as follows: viz, commencing on Sidney Street, at a point distant twenty-five feet from the North side of Stormont street, and running Easterly on a parallel line with Stormont street, forty feet; thence running Southerly along the West line of lot No. 1085, twenty-five feet to the said North side of Stormont street; thence along the said North side of Stormont street, forty feet to the East side of Sidney street; and thence along Sidney street, twenty-five feet to the place of beginning—making a lot twenty-five by forty feet, the same being part of the lot distinguished on the plan of the City of St. John by the number 1086; with all and singular the privileges &c."

By a deed from John Kerr and John Mayes to Patrick Donohue, dated the 5th November, 1840, after certain recitals therein contained, they granted and conveyed to him, all their estate in and to the Western moiety or half part of lot No. 1085, on the plan of the said City, fronting on St. James' street. This lot adjoined the first described lot, purchased from Hatheway, on the Eastern side.

By indenture of mortgage dated the 22nd March, 1864, Patrick Donohue conveyed to Frederick M. Hancock, his heirs and assigns, "All that certain lot, piece and parcel of land, situate in Duke's Ward, in the City of St. John, at the corner of Sidney and St. James' street (formerly known as Stormont street), bounded as follows: that is to say,—commencing on Sidney street, at a point distant twenty-five feet from the North side line of Stormont street (now St. James' street), and running easterly on a parallel line with St. James' street, forty feet; thence running Southerly along the west line of lot No. 1085, twenty-five feet, to the said North side of St. James' street; thence along St. James' street to the East side of Sidney street; and thence along Sidney street to the place of beginning—the same being part of the lot distinguished on the plan of the said City of St. John, as lot No. 1086; together will all the buildings, &c."

By a deed dated the 29th April, 1865, Patrick Donohue conveyed to Susannah McGarrigle, (the defendant) wife of Patrick McGarrigle, her heirs and assigns, "All that certain lot of land and premises, situate in the City of St. John, on the corner of

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Saint James and Sidney streets, and now occupied by the said Patrick McGarrigle and wife,—subject to any charge or mortgage now against the same; together with all the estate, right, title, &c., of, in and to the said described premises, with the appurtenances."

At the time the deed was executed, Mrs. McGarrigle and her husband were in the actual occupation of the lot on the corner of St. James and Sidney streets, mentioned in the deed from Thomas Hatheway to Patrick Donohue: and we may fairly assume from the evidence, that they enjoyed an easement of a very limited character over a small portion of the adjoining lot, which, it is quite clear, was held by several occupants as tenants to Patrick Donohue—the rents of which were, no doubt, collected by Mrs. McGarrigle, but under the authority, and for the benefit of her father, Patrick Donohue. There had originally been separate houses on each of the lots, with an alley-way between them, but Donohue, after he purchased the second lot, had built a roof over the alley-way, connecting the houses together.

The lessors of the plaintiff contend that under the deed to Mrs. McGarrigle, she only took the piece of land described as part of lot No. 1086, and that they, as two of the children and heirs of Patrick Donohue, are entitled to an undivided interest in the other lot, described in the deed from Kerr and Mayes, as the Western half of lot No. 1085. The defendants, on the other hand, contend that both lots passed to Mrs. Garrigle under the deed.

The rule is well established, that where there is property, in respect of which all the facts of the description are found to be true, so that the property exactly fits the description, the whole of that property, and nothing more passes: per ERLE, C. J., in *Webber v. Stanley*,[1] referring to Lord BACON'S *maxims*, "that if there be some land, wherein all the demonstrations in a grant are true, and some wherein part are true, and part false, the words of such grant shall be intended words of true limitation to pass only those lands wherein all the circumstances are true." The case is distinctly recognized in *Smith v. Ridgway*,[2] where WILLES, J., delivering the judgment of the Exch. Chamber, says: "It is unnecessary to enter into an examination of the authorities, for they are all

[1] 16 C. B. N. S. 698.

[2] L. R. 1 Exch. 331.

consistent from the time of Lord BACON to the decision in the case of *Webber v. Stanley,* where ERLE, C. J., laid down the law with a clearness and authority which cannot be strengthened, or added to. The rule which they establish is, that where words can be applied so as to operate on a subject matter, and limit the other terms employed in its description; or, in other words, where there is a subject matter to which they all apply, it is not possible to reject any of those terms as a *falsa demonstratio.* This is expressed in Lord BACON'S maxim, '*non accipi debent verba in demonstrationem falsam, quæ competunt in limitationem veram.*'"

Now, are not all the facts of the description in this deed satisfied by construing it as applying to the lot conveyed to Mrs. McGarrigle's father by Hatheway; and does not that property precisely correspond with the description in the defendants' deed? In the first place, the lot is situated "at the corner of St. James and Sidney streets;" secondly, at the time that deed was executed, that lot was occupied by McGarrigle and his wife; and thirdly—it was subject to the charge or mortgage to Hancock. Does this description fit the adjoining lot, No. 1085? It clearly does not; for that lot is not situated on the corner of St. James and Sidney streets; but altogether on St. James' street; neither was that lot occupied by McGarrigle and his wife, but by the tenants of Donohue, the father; nor was it subject to any charge or mortgage. In no respect, therefore, does the description in the deed apply to lot No. 1085. The lots were separate and distinct, purchased by Donohue, the father, at different times, and from different persons; and while the words in the deed under which the defendants claim, are plain and unambiguous to pass the land purchased from Hatheway, there is nothing to indicate an intention to pass a distinct property, acquired wholly separate from the other, and occupied in a very different manner.

If there is property precisely corresponding with the description in the deed, then that property, and nothing more, will pass; and no evidence ought to be received to extend the terms of the deed, and include property not comprised within its description. The maxim, "*Falsa demonstratio non nocet,*" only applies where there has been a true demonstration by which the subject matter has been

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described and identified, but the subsequent words have raised an ambiguity.

In the case of *Webber v. Stanley* (*supra*), ERLE, C. J., says, that the doctrine of false demonstration can never be properly applied where there is a property which every part of the description fits, and in which every word thereof has full effect. Is not that just the case here? Is there not a perfect demonstration filling every word of the deed? If there could be any doubt as to the application of the words "on the corner of St. James' and Sidney streets," we think the construction is fixed beyond a doubt by the subsequent words—"now occupied by the said Patrick McGarrigle and wife"—for these words cannot be rejected; and the use or occupancy by McGarrigle and his wife of the wood-shed and outbuildings on the lot No. 1085, cannot possibly be construed into an occupation by them, actual or constructive, of that lot. In *Parkin v. Parkin*,[1] it was held that the words "now in my occupation" were restrictive. And in *Griffith v. Pearson*,[2] POLLOCK, C. B., says: "The rule of law is that that construction is to be adopted which will give effect to the whole description without the rejection of any part of it, which can possibly be avoided;" and in *Josh v. Josh*,[3] WILLES, J., says, "That you cannot reject part, where there is something which answers the *whole* description."

We think it is very probable, as was said by LITTLEDALE, J., in *Doe v. Martin*,[4] that if Patrick Donohue had been asked whether he intended the lot No. 1085 to pass by his deed, he would have answered in the affirmative. But the question here is, not what his actual intention was; but what is the intention as expressed in his deed; or, in other words, the meaning and effect of the terms he has used: Per Lord DENMAN, in *Rickman v. Carstairs*.[5] Whatever may have been his intention, if he has used words incapable of passing lot No. 1085, it will not pass: *Smith v. Ridgeway*.[6] It cannot pass under the word "Appurtenances," as land cannot be appurtenant to land: *Lister v. Pickford*.[7]

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[1] 5 Taunt. 321.
[2] 9 Jur. N. S. 385.
[3] 5 C. B. N. S. 463.
[4] 4 B. & Ad. 783.
[5] 5 B. & Ad. 663.
[6] L. R. 1 Exch. 50.
[7] 34 Beav. 576.

While we admit that all the facts relating to the subject matter and object of the conveyance to the defendants, such as its local situation; how it was occupied, &c., might have been given in evidence, we cannot think that evidence was properly admitted to show how Donohue had disposed, by several deeds and by his will, of his other property, real and personal, entirely unconnected with land in dispute, for the purpose of putting a construction on this deed.

FISHER, J. I think there can be no doubt whatever that Donohue intended to convey the land, on the corner of Sidney and Saint James streets, comprising the two parts of lots 1085 and 1086, to his daughter Susanna McGarrigle. It is perfectly clear that his object was to give the whole of his real estate to his three children by his first wife, and his personal property to his children by the second wife; and the question now is, does the deed to Susanna McGarrigle really effect that object? I am of opinion that, taken in connection with the surrounding circumstances, it does. The words of the deed are, "All that certain lot of land and premises situate in the City of St. John on the corner of St. James and Sidney streets, now occupied by the said Patrick McGarrigle and wife, subject to any charge or mortgage now against the same; with the appurtenances; to hold, &c., with all the improvements and privileges of the same."

It was contended that, as the parcels were acquired at different times, Patrick Donohue knew he had part of two lots when he executed the deed. It appears to me the words of the deed in this respect exactly put the state of the land. He purchased at one time part of lot 1086, and at another time the half part or western moiety of 1085, making together one lot. In the deed, the numbers of the different lots are not stated, although it would be a part of two lots. When he gave a single lot, as in the Cliff street property, he designated the lot by its proper number.

The house extends over the whole lot, and it has been always treated as one lot. The house stands on the corner of Sidney and St. James streets; it was divided into seperate tenements. There was a passage way in the yard, and the stairs went up to the second flat on lot 1085, by which all the tenants went into the yard, or up stairs into the upper flat. It is true that the half

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of 1085 is further from the corner than 1086: so would one part of that lot be further than another part; still they both together make the corner lot. No one would describe the house otherwise than as situated on the corner of—not part on the corner and part on St. James' street. If that be true of the house, it must also be true of the land upon which the house stands. The wood-house, outhouse, and yard are all on that portion of the land included in 1085, which are appurtenant to the whole house, and indiscriminately used by all the tenants, and the only conveniences the house had. McGarrigle lived in the lower part of yard, what would be on 1086, and occupied the woodhouse, outhouse and with the other tenants of the whole premises, and Mrs. McGarrigle rented and collected the rents from the other tenants for her father. There was a person living in and occupying the upper part of the house, and there were other tenants in the lower part of the house on lot 1085. If the deed does not convey the whole of the land, what are the appurtenances? And what are the privileges? None that I know of, except the right to go into the street. Surely "Appurtenances" must mean something real, and, if the deed were uncertain in other respects, show what was meant to be conveyed by the deed. What does the plain, ordinary language of the deed mean, and what does the description best fit? The term "Lot" must mean one or two things, either the parcel of land as held, that is, the area comprised in one enclosure, with one house covering the whole, that abutting on the street, with one yard connected with it, and with outhouses and wood-house common to all the tenants. This, in popular language, is a "Lot." Or it must mean a lot, according to the division of the city, having the quantity of a city lot, with its appropriate number, as in the case of the lots on Cliff street. Now the portion of 1086 on the corner will not answer the latter description, because it is only *part* of a City lot, and only part of the corner lot. No. 1086, according to the city division. So that, in this respect, the whole lot best fits the description. In my opinion, it will only fit it. If that is the natural and ordinary meaning of the words, why should we seek for another, which will defeat the object of the grantor?

It is subject to the mortgage to Hancock. It is true the mort-

:age only applies to the half of 1086; still he takes the lot subject o that charge. It is occupied by McGarrigle. He lived in one ›art of the lower flat, and used and occupied the yard and out- ouse, and rented the other part of the house, and in this mode eld the whole lot, and is properly described in the deed as hav- ıg occupied the lot. I may add that the two lots on Cliff street re each conveyed by their numbers, and the deeds to Donohue the two portions of the land in dispute are conveyed by num- 'rs. The mortgage to Hancock specifies part of lot 1086 pre- sely as in the deed from Hatheway to Donohue, shewing that the ımber was used when required, and if only part of the lot had en intended, I think the deed would have stated it with its proper ımber.

If it was intended to limit the conveyance to the portion of lot '86, mentioned in the Hatheway deed, I think he would have ıployed the language of that deed, designating it as part of the rner lot No. 1086; and had the deed referred specifically to the 'o parts of lots 1085 and 1086, it would, according to the usual ode of conveyance, have followed the description in the present ›ed precisely as it is, and then added some words of qualification to the fact specifying how the lot was made up or acquired, ıch as, after the description of "a lot on the corner of St. James nd Sidney streets," being part of lots 1085 and 1086, conveyed him by the respective deeds.

In this case, I am of opinion that the plaintiffs are not entitled recover, and that the rule should be discharged.

The learned Judge referred to *Fox v. Clarke.*[1]

WELDON, J. I am unable to arrive at the conclusion which majority of my brethren have come to on the deed from Patrick onohue to his daughter Susanna, wife of the defendant, dated e 29th April, 1865, of lands in the City of St. John, thus scribed: "All that certain lot of land and premises, situate on the rner of Saint James and Sidney streets, and now occupied by e said Patrick McGarrigle and wife, and subject to any charge mortgage now against the same, with all the estate, &c., with e appurtenances." At the time of making the deed the grantor

[1] L. R. 7 Q. B. 748.

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was owner of 25 by 40 feet of a lot designated on the City plan as 1086, and the half of lot 1085 adjoining the same, the two parts of the said lots, having a front on Sidney street of 25 feet, and 60 feet on St. James' street; the whole of the front on the two streets was covered by a house, with a passage in the centre from St. James' street to the rear of the half lot 1085, on which the wood-house and out-house stood, and yard common to the defendants and all the tenants occupying dwellings in the house—the rents of the rooms was received by Mrs. McGarrigle and paid to her father—the passage was the only way of getting from the street into the yard. It also appeared in evidence that, at the time of making the deed, the grantor made other deeds to his children of lots of land in the City, describing the numbers designated on the City plan; he also made his will devising all his personal property to his wife and two younger children. Evidence was given by the plaintiff to shew that the grantor had given a mortgage on the part of lot 1086, describing it in the same manner as conveyed in the deed to him, naming the number: this, the plaintiff contended, designated the land he intended to convey to his daughter, Susanna McGarrigle, and that evidence given on behalf of the defendants, of all the surrounding circumstances when the grantor made the deed, was immaterial and improperly received to shew the property which he had, his family, that he was making a disposition of his property, the state and condition of the occupation at the time, and situation of parties.

I am of opinion this evidence was material and admissible, for, as MARTIN, B., says, in *Dodd v. Burchall*:[1] "In order to understand the meaning of the instrument, you should put yourself in the position of grantor and grantee, and read it with all the knowledge they had upon the subject; having assumed this position, the writing is to decide the right of parties;" and Lord C. J. WILLES, in delivering judgment in the case of *Smith v. Packhurst*,[2] lays down several maxims in the construction of deeds; the first of which is, that the end and design of the deed should take effect rather than the contrary; and such construction should be made as most agreeable to the intention of the grantor. The words are

[1] 8 Jurist, N. S. 1181.

[2] 3 Atkyns 136.

not the principal things in a deed; but the intent and design of the grantor. "Another maxim is, that such a construction should be made of the words of a deed as is most agreeable to the intention of the grantor; the words are not the principal thing in a deed, but the intent and design of the grantor: we have no power indeed to alter the words or insert words which are not in the deed, but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, and may reject words which are merely insensible."

In the case of *Lord Waterpark v. Fennell,*[1] Lord WENSLEYDALE, says: "Whether parcel or not is often said, but not with strict propriety, to be a question for the jury. I apprehend the true rule is perfectly well settled, and is fully explained in Sir J. WIGRAM'S excellent treatise on the subject. The construction of a deed is always for the Court; but in order to apply the provisions, evidence is in every case admissible of all existing facts at the time of the execution of the deed, so as to place the Court in the situation of the grantor. In deeds as well as wills, the state of the subject, at the time of execution, may always be enquired into."

The lot of land and premises which the grantor had were parts of two lots, not one whole lot—he erected a building on those two parts, there was one dwelling, one set of out-buildings, one entrance to the rear or back of his lot and premises—his daughter and the defendant, her husband, resided on the premises, the daughter received the rents, tho' paid over to her father. Does this not describe the whole of the property the grantor had, and answer the description of his lot and premises—"with the appurtenances"—though land cannot be appurtenant to land—but it does not follow that the word "Appurtenances" may not in some cases be so used as to shew the intent of the party to convey land under that designation; and was not the intention clearly expressed that what McGarrigle and wife had in possession should pass by that name, and if so, will not the law give effect to the grant? *Com. Dig.* Tit. *Grant,* E. 9; *James v. Plant.*[2] No other description would so well suit, unless the grantor had particularized it by

[1] 5 Jur. 1141.

[2] 4 Ad. & El. 749.

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stating his premises at the corner of Sidney and St. James' street, as "my two half lots, or portions of lots as numbered on the plan" —and the occupation of the defendants, the collecting of the rents by the defendant's wife, from the occupants of the rooms, all the surrounding circumstances combine to shew what the premises were he was conveying.

I am, therefore, of the opinion the deed conveyed all the property the grantor had at the corner of the said streets, being parts of the two City lots, without unnecessarily straining the words in the deed, and that the rule for entering a verdict for the lessor of the plaintiff, ought to be discharged.

Rule to enter judgment for the lessors of the plaintiff for two undivided fifths part of the land in dispute.

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February

Ex parte THE BANK OF NEW BRUNSWICK.

:sment—Corporation—Against whom assessment to be made-
Stock—Whether to be on par value or market value.

sessment against a Joint Stock Corporation must be made against the Presi-
t or Manager of the Company.
Bank of N. B. was assessed on $20,000 real estate and $1,330,000 personal
ite, which last sum was arrived at by taking the market value of the Stock
the Bank; and the Court were of opinion this was not a correct mode of
ssment, as thereby the real estate was rated twice.
· the Act 22 Vic. c. 37 § 12, the assessment should be made upon the actual
ue, and not upon the par value of the Stock of an incorporated Company.

ι rule *nisi* was obtained to remove the general assessment on
City of St. John, with a view to quashing the same, on the
cation of the Bank of New Brunswick, the grounds of which
tated in the judgment.

ct. 23, 1872. *Duff, Q. C.*, shewed cause.

- *R. Thomson, Q. C.*, was heard in support of the rule.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C. J. By the 22 Vic. chap. 37, sec. 12, rates are
orized to be levied and imposed (*inter alia*) upon the capital
k of joint stock companies; and section 14 provides the
nner in which joint stock companies are to be assessed; and
ares "that for the purpose of such assessment, the President
any Agent, or Manager of such joint stock company, or
oration, shall be deemed to be the owner of the real and
sonal estate, capital stock and assets of such company, or
oration, and shall be dealt with and may be proceeded against
rdingly, * * * and such President, Agent, or
nager, shall in regard to the real and personal estate, income
other thing of such company or corporation, be assessed
rately and distinctly from any other assessment to which he
be liable. He may charge against and recover from such
pany, or corporation the amount of any assessment which he
be required to pay on account of such company, or corpora-
, under the provisions of this act." The right to assess and
mode of assessing corporations are purely statutory, and no
ssment can be legally made or collected unless the provisions of

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the Act are followed, and the person or corporation whom it is proposed to assess be brought within the express terms of the Act.[1] The only mode of assessing a joint stock company, or corporation, is by assessing the President, Agent or Manager, as pointed out in the section referred to. This has not been done in the present case, and there is no authority for assessing the Bank in the manner adopted by the assessors; and therefore the assessment so made cannot be sustained; and, even if the assessment was allowed to stand, we see no possible way in which it could be legally collected against the Bank. We think this clearly a matter of substance, and therefore the 26 vic. chap. 28, sec. 4, does not apply.

We have been urged to intimate our opinion as to the propriety of the assessment in respect to the amount assessed. It is not necessary for the decision of the question really before us to discuss this question; but we may say, that having looked at the acts, as at present advised, we think that, as the Bank was assessed on $20,000 real estate, and on $1,330,000 personal estate, which last sum was arrived at by taking the market value of the stock of the Bank, which would appear to have been 50 per cent. premium, this was not a correct mode of assessment, because thereby the real estate is clearly rated twice, once as real estate, and afterwards as included in the stock of the company, of which it formed a part, or, rather, which the stock represented. It was also contended that, as, by the 1 R. S. chap. 53, tit. 8, sec. 17, it was declared that public stocks in any incorporated company should mean the amount of the paid-up capital stock of any company at its correct value at the time of assessment, that this means its par value; but, while we think this refers to the actual, as opposed to the par value, it does not affect the present case, because the St. John assessment is under the 22 vic. chap. 37, and there, "for the purposes of that act *the value* of all real and personal estate and joint stock shall be deemed and taken to be and shall be put down at one fifth of the *actual worth thereof as nearly as the same may be ascertained,*" which, in our opinion, clearly refers to its market value.

We intimated on the argument that we could see no reason

[1] L. R. 4 H. L. 122.

why the assessors might not, under the 31 vic. chap. 36, sec. 8, correct this error in the assessment, and make the assessment as it should have been made in the first instance, provided it is done before another assessment is made for a similar purpose.

Rule absolute.

BETTS *v.* VENNING *et al.*

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Trespass—Tenant—Action by—Damages—Lease, production necessary—Secondary evidence—Examination of defendant—Recalling.

If the plaintiff calls and examines the defendant as a witness, he is not, when afterwards examined as a witness in his own case, to be treated as a recalled witness; but his counsel has a right to examine him, and to prove his defence as fully as if the defendant had not been previously called as a witness by the plaintiff.

In an action of trespass for cutting down a mill dam, the plaintiff relied on, and gave evidence of possession only. On cross-examination, he admitted that he held the property under a written lease from G., and stated that he was bound by the lease to keep the premises in repair.

Held, that the plaintiff was bound to produce the lease, to enable the judge properly to direct the jury as to the effect of it and as to the amount of damages which the plaintiff, as tenant, would be entitled to recover.

This was an action of trespass *quare clausum fregit* for cutting down a mill-dam, tried before WELDON, J., at the Westmorland circuit. Verdict for plaintiff. In Hilary term, 1872, *Tuck, Q. C.*, obtained a rule *nisi* for a new trial on several grounds, of which it is unnecessary to mention more than the following upon which the judgment of the Court proceeded—1st, Improper rejection of evidence in refusing to allow Deacon (one of the defendants) when called by the defence, to give evidence of a conversation that had taken place between him and the plaintiff, and to contradict plaintiff, the ground of its rejection being that defendant's counsel had cross-examined Deacon, when on the stand, as plaintiff's witness. 2nd, Improper admission of parol evidence of the contents of a lease of the *locus in quo* from Wm. J. Gilbert to plaintiff, without the production of the lease, (a) because its non-production was not accounted for, and (b) because the witness was allowed to speak of the legal effect of it, instead of giving the very words.

June 16, *W. J. Gilbert* and *Morrison* shewed cause. 1st, The defendant's counsel, having cross-examined Deacon while on

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the stand as a witness for the plaintiff, only sought, in his own case, to contradict plaintiff on an immaterial issue,—seeking, not to prove the contents of the conversations—but to establish the fact of their having taken place, which he had no right to do: *Ros. Ev.*[1] 185; *Reg.* v. *Holmes.*[2] 2nd, The lease was no part of the plaintiff's case, and the fact of its existence and the parol evidence of its contents were elicited on plaintiff's cross-examination: therefore the defendant cannot avail himself of this objection. 2 *Tayl. Ev.* 1254 and *Henman* v. *Lester*[3] were cited.

Tuck, Q. C., in support of the rule, cited *Doe d. Edgett* v. *Styles*;[4] *Curtis* v. *Greated.*[5]

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C. J. When the defendant Deacon was put on the stand as witness for the defendants', we think the defendants' counsel should have been allowed to examine and prove the defendants' case by him, precisely in the same manner and to the same extent as if he had not been called as a witness by the plaintiff, and that his examination should not have been made dependent on or been in any way restricted by what had taken place in the course of his examination as a witness on the part of the plaintiff, provided of course the question was put in a proper form and was relevant to the issue, and would have been properly receivable had the witness not been previously called and examined in plaintiff's case, it being in our opinion the defendant's privilege and right to conduct and prove his case wholly independent of the plaintiff's manner of proving his, that is, if defendant calls a witness previously called by the plaintiff, when he so makes him his witness he has a right to deal with him precisely as if he were there for the first time on the stand in the case; and then he is not to be treated as a recalled witness. Though this is our opinion, and we think the objection of Mr. *Morrison*, as put forward by him, untenable, still we should have hesitated before granting a new trial on this point, because Mr. *Tuck* avowed, in

[1] 12 ed.
[2] L. R. Crown Cas. reserved p. 334, Feb 1872.
[3] 12 C. B., N. S. 776.
[4] 1 Kerr, 338.
[5] 1 Ad. & E. 167.

asking the question, he only wanted to ascertain thereby whether the witness had had a conversation or not, and without shewing what the conversation was; and we cannot very well see how the answer one way or the other could properly affect the case. But there is a most substantial ground taken for a new trial that cannot be got over so easily. In this case, it appears to us the plaintiff, though holding the land only as a tenant, has recovered for the whole amount of damage alleged to have occurred by means of the cutting away of the dam, because he alleged that as such tenant, he was bound to keep the premises in repair, and so liable to repair or replace the dam; and he has in fact recovered damages based on such an hypothesis. No allegation of this nature appears in the declaration, and it is most remarkable that, neither in the opening of the plaintiff's counsel, nor on the plaintiff's direct evidence, is there any mention made of, or slightest allusion to a written lease, or to holding as a tenant, and the fact that there was such a document and that the plaintiff held under it, having been brought out on the cross-examination of the plaintiff by the defendants' counsel, when the fact came out there did not appear to have been any effort to produce the document or any excuse offered for its non-production. There is a presumption against persons who keep back a document, and against them the "evidence is always to be taken most strongly:" *Attorney-General* v. *Windsor*.[1] See also *Barker* v. *Davis*.[2] Having elicited the fact generally, perhaps it would have been a more prudent course for the plaintiff's counsel to have refrained from questioning the plaintiff further as to the lease; but, after carefully examining the Judge's notes, we think there was not, giving the plaintiff the full benefit of the evidence elicited by the defendants' counsel, sufficiently satisfactory evidence of the contents of the lease; and that, as the very foundation of the plaintiff's case and actual recovery was his right under the lease, and the effect of a covenant or agreement said to be contained in it, the lease itself should have been produced, or, if secondary evidence was admissible, sufficient evidence offered to enable the Judge to construe the lease by its language, and direct the jury as to its legal effect. It is quite as important that the words of the lease in this case

[1] 24 Beav. 679.

[2] 11 Jur. N. S. 651.

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shoud be proved as the words of a libel, when the paper containing the libel is not forthcoming. In the Law Reports 5 P. C. 298, SIR MONTAGUE SMYTH says: "If the defamatory writing does not exist, and secondary evidence is offered of its contents, the words must be proved, and not what the witness believes to be the substance or effect of them; for otherwise witnesses, and not the Court and jury, would be made judges of what was a libel." So here the witness himself construes the lease and gives evidence of its effect, thereby making himself, not a witness of its contents, but the judge of its meaning, we think, it being quite clear that the construction of a written instrument, though proved by parol, is for the Judge, while the veracity of a witness is not questioned as to its contents, see *Berwick* v. *Horsfall*,[1] *Neilson* v. *Harford*.[2] The mere statement of the plaintiff, though drawn out on cross-examination by the defendant's counsel; "I was bound to keep the premises in repair," or, on re-examination, "I was to keep the premises in repair, to allow no trespassing on it by the terms of my lease," was not sufficient to supply the deficiency of an element so essential to the plaintiff's case, as was a knowledge of the actual and precise contents of the lease, and on which the plaintiff claimed to recover, to enable the Judge to give it a proper construction, and without which, no proper trial could be had, as the plaintiff's own case showed that the estate in fee was not in himself, but in Gilbert, whom he claimed to be his landlord.

Rule absolute for new trial.

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Insolvent Act of 1869—*Compulsory liquidation—Where no petition presented by debtor—Proceedings.*

M., a creditor of defendant, made a demand upon him to assign his estate for the benefit of his creditors under the 14th section of "The Insolvent Act of 1869." No petition was presented within five days, as required by the Act. but after that time the defendant settled his debt with M., who took no further proceedings.

Held, that the estate of the defendant was nevertheless subject to compulsory liquidation, and that the demand of M. enured to the benefit of the other creditors of the defendant.

Appeal from the decision of the county Court Judge, for the City and County of St. John. A writ of attachment having

[1] 4 C. B., N. S. 450.

[2] 8 M. & W. 823.

ssued by the plaintiff against the defendant, an application ade to the County Court Judge to set aside the writ, but was d. This judgment was appealed from to WETMORE, J., and m referred to the full court. The material facts of the case ently appear in the judgment.

eb. 7, *B. L. Peters, Q. C.*, for the appellant, cited *Tope* v. kin,[1] *In re Bristow,*[2] *In re Stray.*[3]

C. *W. Weldon,* for the respondent.

Peters, Q. C., was heard in reply.

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RITCHIE, C. J. To my mind this case is very clear. The emand appears to have been regularly made under section 14, nd no proceedings were taken by the debtor under any of the rovisions of the Act for the purpose of suspending proceedings, r getting rid of the effect of the demand, and so the estate by irtue of section 17 became subject to compulsory liquidation. ut it is contended that the party making the demand was the nly person who could act on it; that he had a right, if he chose, abandon the demand; and that, if his claim was arranged, as it as alleged it had been in this case, and he agreed to abandon rther proceedings, as it was alleged he had, he would be estopped; nd, if he could not take further proceedings, neither could ny other or others of the Insolvent's creditors. When a demand made, and the debtor does not get rid of the effect of it, or ake the assignment required, what is contemplated? Why, mply that the Insolvent's estate becomes subject to compulsory quidation. What is there in the Act to prevent the same consequences resulting as if it had become subject to compulsory iquidation under any one of the paragraphs of section 13? It as been said that the term "claimant" in the 14th and 20th ections is used in a sense distinct from "debtor," but Mr. *Peters,* ho argued the case very ingeniously, wholly failed, in my opinion, o establish the distinction. The term "such creditor or crediors" in section 15 refer unquestionably to the same persons who

[1] 7 B. & C. 101.
[2] L. R. 3 Ch. App. 247.
[3] L. R. 2 Ch. App. 374.

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are in section 14 designated "one or more claimants;" the words in the two sections being clearly used as synonyms. So, in section 20, the term "claimant" is clearly used as signifying "creditor," because it there applies to all cases in which an attachment shall be sought on the ground of the debtor's estate having become subject to compulsory liquidation, no matter for what reason or by what manner; and is not confined to cases where it has become so liable by reason of a demand under section 14. A claimant, being a creditor, may make a demand of his own mere motion. But a claimant, being a creditor, must show to the satisfaction of the Judge that he is a creditor for not less than $200, and also by the affidavits of two credible witnesses such facts and circumstances as shall satisfy the judge that the debtor is insolvent within the meaning of the Act, and that his estate has become subject to compulsory liquidation, before an order can be obtained for an attachment. So soon, then, as the evidence is produced to the judge, he has no discretion, but must at once order the attachment. And does it not clearly shew that there is no distinction as to who among the creditors, provided their debt or debts amount to the required sum, should apply for the attachment in case the debtor, by reason of any of the contingencies set forth in the Act, permits his estate to become subject to compulsory liquidation? And is it not distinctly at variance with the whole policy of the Act, to allow an individual creditor to take steps necessary for subjecting the estate to compulsory liquidation, and, after it shall have become so subject, to confine to such creditor alone the right to make it liable to the consequences of having so become subject? Or, where it had become so subject, to permit any one creditor, by effecting a private arrangement with the Insolvent, and agreeing to abandon the notice, to prevent the rest of the creditors from availing themselves of the right expressly conferred on them by reason of the debtor's estate having become subject to compulsory liquidation? I can find nothing in the Act conferring on the creditor who makes the demand any priority, or privilege, over the other creditors, still less, the right or privilege of saying that the estate shall not be liable to compulsory liquidation when the law says, under a certain event or under certain circumstances, it shall be, and it actually has become so liable; or to allow him to hold the

demand in abeyance, to be used or not, by himself alone, and thereby enable him to force a settlement in his own favor, behind the backs of the body of his creditors. I am of opinion that, after the estate has once become subject to compulsory liquidation, no matter whether under all or any of the contingencies provided for in section 13, or under that referred to in section 17, any creditor, bringing himself within the provisions of the Act, has a right to apply to the judge for the attachment, and that no creditor, whether the estate has been made liable to compulsory liquidation by reason of any act or proceedings of his, or not, has any right to release, absolve or discharge the estate of the insolvent from such liability, and that both the insolvent and his estate can only be relieved under some or other of the means expressly provided in the Act.

ALLEN, WELDON, FISHER, and WETMORE, J. J., concurring.

Appeal dismissed.

EX PARTE RENAUD AND OTHERS.

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Common Schools Act, 1871—Constitutionality—Ultra Vires—Non-Sectarian—Regulations—Effect of.

The Parish School Act, (21 Vic. c. 9.) conferred no legal right upon any class of Persons with respect to Denominational Schools; therefore "The Common Schools Act 1871," which declares, that the schools conducted under its provisions shall be non-sectarian is not *ultra vires*, as being contrary to "The British North America Act 1867" § 93.

The Constitutionality of "The Common Schools Act 1871," cannot be affected by any Regulations of the Board of Education, made under its authority; and, *Semble*, if the Board of Education have made regulations which they ought not to have made, or have not made regulations which they should have made, it is a case within sub-section 4 of "The British North America Act 1867," § 93.

This case came before the Court on an application for a *certiorari* to remove an assessment for school purposes, made on the Parish of Richibucto, in the County of Kent, on the ground that the Common Schools Act, 1871, was beyond the powers of the Local Legislature, and consequently void and of no effect. A rule *nisi* having been obtained, in Michaelmas term, 1870.

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King, A. G., A. L. Palmer, Q. C., Fraser and Dr. *Barker,* shewed cause.

Duff, Q. C., S. R. Thomson, Q. C., James and *C. W. Weldon,* were heard in support of the rule. The arguments of counsel are referred to in the judgment of the Court.

Cur. Adv. Vult.

The judgment of a majority of the Court (RITCHIE, C. J., and ALLEN, and WELDON, J. J.) was now delivered by

RITCHIE, C. J. We are asked to set aside the assessment in this case, on the ground that the Legislature had no power or authority to enact the Law under which such assessment was levied—The Common Schools Act, 1871—inasmuch as, it is contended, it contravenes 'The British North America Act, 1867,' and is consequently void and of no effect. We have never doubted that, when a Provincial Act and an Imperial Statute are repugnant, so far as such repugnancy extends, but no further, the Provincial Act is void; and this principle has been, since the passing of 'The British North America Act, 1867,' on several occasions enunciated and acted on in this Court; and we should not have thought it necessary now to refer to it, still less to support by authorities the views we have always entertained on this point, (without any doubts), were it not that we observe that in the neighboring Province of Quebec the question has been much discussed, and the Court divided in their opinions on the subject, though the majority arrived at the same conclusion as that which has hitherto governed this Court. We have always thought it a constitutional principle, too clear to be seriously questioned, that the subordinate legislative power of a Colonial Legislature must succumb to the supreme legislative power and control of the Parliament of Great Britain, and therefore have heretofore considered it wholly unnecessary to cite any authority; but as there is a clear statutory recognition, as well as the highest Judicial declaration in support of the accuracy of the view we have acted on, we think it as well now to name them. In the Imperial Act 28th & 29th Vic. cap. 63, sec. 2, it is enacted—"That any Colonial Law which is, or shall be, in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the Colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative." And sec. 3 says—"No Colonial Law

shall be or be deemed to have been void or inoperative on the ground of repugnancy to the Law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid." And this Statute has undergone judicial comment in the case of *Phillips* v. *Eyre*,[1] where WILLES, J., in delivering the judgment of the Exchequer Chamber, in stating the effect of this Statute, after putting forward what has always been considered Law in this Province, viz. that an English statute only binds the Province when it is by the express words of the statute, or by necessary intendment, made clearly applicable to the Province, says—"It was argued that the Act in question (an Act passed by the Legislature of Jamaica) was contrary to the principles of English Law, and therefore void. This," he says, "is a vague expression, and must mean either contrary to some positive Law of England, or to some principle of natural justice, the violation of which would induce the Court to decline giving effect even to the Law of a Foreign Sovereign State. In the former point of view, it is clear that the repugnancy to English Law which avoids a Colonial Act, means repugnancy to an Imperial statute or order made by authority of such statute applicable to the Colony by express words or necessary intendment, and that so far as such repugnancy extends, and no further, the Colonial Act is void."

But long prior to the passing of either the 28th & 29th Vict. c. 63, or 'The British North America Act, 1867,' the Judiciary of England authoritatively declared what the law was on this subject, in answer to a question propounded to the Judges by the House of Lords.

On the fourth day of May, 1840, the Lord Chief Justice of the Court of Common Pleas delivered the unanimous opinion of the Judges (with the exception of Lord Denman and Lord Abinger, who did not attend the meeting of Judges) upon the questions of Law propounded to them, respecting The Clergy Reserves' (Canada) Act. In answer to the question lastly propounded, (question 3), which is as follows:—"Whether the Legislative Council and Assembly of the Province of Upper Canada, having, in an Act 'To provide for the sale of the Clergy Reserves, and for the distribution of the proceeds thereof,' enacted that it should be lawful for the Governor, by and by with the advice of the Executive Council, to sell, alienate and convey in fee simple, all or any of the said Clergy Reserves; and having further enacted in the same Act, that the proceeds of past sales of such Reserves which have been or may be invested under the authority of the Act of the Imperial Parliament, passed in the seventh and eighth years of the Reign

[1] L. R. 6, Q. B., 20.

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of his late Majesty King George the Fourth, intituled 'An Act to authorize the sale of part of the Clergy Reserves in the Provinces of Upper and Lower Canada,' shall be subject to such orders and directions as the Governor in Council shall make and establish, for investing in any securities within the Province of Upper Canada, the amount now funded in England, together with the proceeds hereafter to be received from the sales of all or any of the said Reserves or any part thereof, did in making such enactments, or either of them, exceed their lawful authority;" His Lordship said—"In answer to the question lastly propounded, we all agree in the opinion, that the Legislative Council and Assembly of the Province of Upper Canada have exceeded their authority in passing the Act 'To provide for the sale of the Clergy Reserves, and for the distribution of the proceeds thereof,' in respect of both the enactments specified in your Lordships' question. As to the enactment, that it should be lawful for the Governor, by and with the advice of the Executive Council, to sell, alienate and convey in fee simple, all or any of the Clergy Reserves; we have, in answer to the second question, already stated our opinion to be such, as that it is inconsistent with any such power in the Colonial Legislature; and as to the enactment 'that the proceeds of all past sales of such Reserves, which have been or may be invested under the authority of the Act of the Imperial Parliament, passed in the seventh and eighth George 4th, for authorizing the sale of part of the Clergy Reserves in the Provinces of Upper and Lower Canada, shall be subject to such orders and directions as the Governor in Council shall make and establish for investing in any securities within the Province of Upper Canada the amount now funded in England, together with the proceeds hereafter to be received from the sales of all or any of the said Reserves; we think such enactment is, in its terms, inconsistent with and contradictory to the provisions of the statute of the Imperial Parliament, seventh and eighth George 4th, and therefore void, there being no express authority reserved by that Act to the Colonial Legislature to repeal the provisions of such latter Statute."

Assuming, then, that it is not only the right, but the bounden duty of this Court to deal with questions of this nature when legitimately presented for its consideration, we must endeavour to ascertain whether there is such a repugnancy in this case as will constrain us to declare "The Common Schools Act, 1871," void, in part or in whole.

It is contended, that the rights and privileges of the Roman Catholic inhabitants of this Province, as a class of persons, have been prejudicially affected by The Common Schools Act, 1871, contrary to the provisions of sub-section (1) of section 93 of 'The

British North America Act.'[1] We have now to determine whether any class of persons had, by law, in this Province, any right or privilege with respect to denominational schools at the Union, which are prejudicially affected by the Common Schools Act of 1871. This renders it necessary that we should, with accuracy and precision, ascertain exactly what the state of the law was with reference to denominational schools, and the rights of classes of persons in respect thereto, at the Union. At that time, what may fairly and legitimately be called the Common School system of the Province was carried on under an Act passed in the 21st Vic. c. 9, intituled "An Act relating to Parish Schools." There were, no doubt, at the same time in existence, in addition to the schools established under the Parish School Act, schools of an unquestionably denominational character, belonging to, and under the immediate government and control of particular denominations, and in which, there can be no doubt, or it may reasonably be inferred, the peculiar doctrines and tenets of the denominations to which they respectively belonged were exclusively taught, and therefore had, what may rightly be esteemed, all the characteristics of denominational schools, pure and simple. We do not here refer to Collegiate Institutions, which it has been strongly, and with great force urged, were not within the contemplation of the Imperial Parliament, or intended to be affected by 'The British North America Act, 1867;' but we refer to such schools as the Wesleyan Academy, Sackville, as incorporated by the 12th Vict. cap. 65, amended by 19th Vic. cap. 65, a Corporation entirely distinct in law, as we presume also, in fact, from the College which the Trustees of that Academy are authorized to found and establish

[1] By the 93rd section of 'The British North America Act, 1867.' it is enacted, that—"In each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

"(1) Nothing in any such Law shall prejudicially affect any right or privilege with respect to Denominational schools, which any class of persons have by law in the Province at the Union.

"(2) All the powers, privileges and duties at the Union by law conferred and imposed in Upper Canada on the Separate Schools and Trustees of the Queen's Roman Catholic subjects, shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic subjects in Quebec.

"(3) Where, in any Province, a system of Separate or Dissentient Schools exists by law at the Union, or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor General in Council from any act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to Education.

"(4) In case any such Provincial Law as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor General in Council on any appeal under this section is not duly executed by the proper Provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor General in Council under this section."

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under the 21st Vic. cap. 57; an Institution entirely under the control of the Wesleyan denomination, and in which, or in any department thereof, or in any religious service held upon the said premises, it is enacted that no person shall teach, maintain, promulgate or enforce any religious doctrine or practice contrary to what is contained in certain Notes on the New Testament, commonly reputed to be the Notes of the Rev. John Wesley, A. M., and in the first four volumes of Sermons, commonly reputed to have been written and published by him. The Varley School, endowed by the late Mark Varley, who bequeathed certain property "To the Trustees of the Wesleyan Methodist Church of the City of Saint John, for the establishment and maintenance of a day School," which devise was confirmed by the 13th Vic. cap. 2, and the property vested in certain persons, viz., the Trustees of said Wesleyan Methodist Church in the City of Saint John, in connection with the British Conference, upon the Trusts, &c., in said Will. The Madras School, which by its Charter is to be conducted according to the system called the Madras system, as improved by Dr. Bell, and in use and practice in the British National Education Society, incorporated and established in England; which National Society, established in 1811, was incorporated in 1817, for promoting the education of the poor in the principles of the Established Church throughout England and Wales; the schools established by such Society being purely denominational, in which the children are to be instructed in the Holy Scriptures, and in the Liturgy and Catechism of the Established Church, and, "with respect to such instruction the schools are to be subject to the superintendence of the Parochial Clergyman, and the Master and Mistresses are to be members of the Church of England." And the Baptist Academy or Seminary—the Roman Catholic School established in the City of Saint John—the Free School in Portland, under the Board of Commissioners of the Roman Catholic School in Saint John—the Roman Catholic School in Fredericton—the Roman Catholic School in Saint Stephen—the Roman Catholic School in Saint Andrews—all of which are recognized by name by the Legislature in various Acts, anterior to the 21st Vic. cap. 9, and received specific annual grants from the Public Provincial Funds, outside the Parish School Act.

In the year 1857, and subsequently thereto, the money intended for educational purposes has been annually granted in a lump sum, viz., so much "to provide for certain educational purposes," not specifying any particular school or purpose, as had been theretofore customary. But the Estimates of the Public Expenditure which appear in the public Journals, shew that appropriations of a similar character have been since annually made. Thus in the year 1867, but before the 1st day of July (the day of the Union),

it will be seen by the Journals of the House of Assembly, page 45, that in addition to the amount authorized by Law, the following schools, among others, received special grants, viz:—The Madras School; the Wesleyan Academy; the Baptist Seminary; the Roman Catholic School, Fredericton; the Presbyterian School, Saint Stephen; the Roman Catholic School, Saint John; the Varley School, Saint John; the Roman Catholic School, Milltown; the Roman Catholic School, Saint Andrews, male and female; the Roman Catholic Schools, Carleton, Woodstock, Portland, and Bathurst; the Presbyterian School, Chatham; Roman Catholic School, Newcastle; and the Sackville Academy; and in the Journals for 1871, the year the Common School Law passed, are to be found special appropriations for the above schools; so that it is obvious there were in existence at the time of the Union, and have been ever since in this Province, apart from schools established under the Parish School Act, denominational schools, recognized by the Legislature and aided from the public revenues. But as it is not contended that the Common School Law prejudicially affects any right or privilege with respect to these schools, which any class of persons had by law at the Union, it will be necessary to examine minutely and critically the Parish School Act of 1858, under which it is contended 'Rights and Privileges' existed which it is alleged have been so affected. By that Act, the Governor in Council, with a Superintendent appointed by the Governor and Council, constituted the Board of Education; the Province was to be divided into districts by the Governor and Council, who were to appoint an Inspector for each district; and to the Board of Education was confided the power of making Regulations for the organization, government and discipline of the Parish Schools, and for the examination, classification, and mode of licensing teachers: to appoint examiners of teachers; to grant and cancel licenses, and to hear and determine all appeals from the decision of the Trustees; to prescribe the duties of Inspectors of Schools; to apportion all moneys granted by the Legislature for the support of such schools, among the several Parishes, in proportion, &c.; and to provide for the establishment, regulation and government of School Libraries, and the selection of Books to be used; but no books of a licentious, vicious, or immoral tendency, or hostile to the Christian Religion, or Works on Controversial Theology, were to be admitted. To the Superintendent was confided, subject to the order of the Board, the general supervision and direction of the Inspectors, and the enforcement and the giving effect to all the regulations made by the Board; he was to collect information on Education, hold meetings in different parts of the Province, to which he was to invite the attendance of the Inspectors, teachers, and inhabitants; to address such meetings on the subject of Education, using all

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legitimate means to excite an interest therein; to cause Trustees, School Committees, and Teachers, to be furnished with copies of the Regulations of the Board of Education, &c.; to adopt measures to promote the establishment of School Libraries; to provide plans for the construction of School Houses, &c.; with power to sue for books, &c., purchased for the use of Parish Schools, and for all moneys due on sale thereof; and he was required annually to prepare a report upon the condition of the Schools and School Libraries, with information upon the system and state of Education generally; the amount expended in promoting it; with suggestions, accompanied with a return of moneys received for the sale of Books, &c., to be laid before the Legislature within ten days after the opening thereof. Provision was then made that three Trustees of Schools should be annually elected in each Town or Parish, at the time and in the same manner as other Town and Parish Officers; who should be subject to the same pains and penalties for neglect or refusal to act, or the non-performance of their duties, as other Town and Parish Officers; and when any Town or Parish failed to elect, the Sessions should appoint as in other cases. In incorporated Towns, Cities, or Counties, the Council were to appoint the Trustees. The duties of the Trustees were pointed out: they were to divide the Parishes into convenient School Districts; to give any licensed teacher authority in writing to open a school in a district where the inhabitants had provided a school house and secured salary, and with their assent to agree with such teacher; to suspend or displace teachers for incapacity, &c. They were required immediately after ratifying the engagement of a teacher, and annually thereafter, to call a meeting of the rate-payers of the district, for the purpose of electing a School Committee of three persons; they were to accompany the Inspector in examination of Schools; they were at least once a year to examine all schools; to authorize such number of schools in any Town, &c., as the wants of the inhabitants might require; and if they deemed it necessary, authorize the employment of an Assistant Licensed Teacher in any large school; to apportion among school districts any money raised by County or Parish assessment for support, &c., of Schools. The election of a School Committee by the rate-payers was then provided for, and their duties pointed out, viz., to have charge of school house furniture, &c.; to call meetings of inhabitants for providing school house, books, &c.; to have control of any Library, and appointment of a Librarian, &c.; to receive and appropriate all money raised in the district for providing a Library, &c.; to admit free scholars, and children at reduced rates, being children of poor and indigent parents, &c.

The duties and qualifications of Teachers are minutely detailed in section 8.[1]

Provision is then made for Provincial assistance for support of Superior Schools and Libraries; and the subsequent sections of the Act provide for assessment whenever the majority of rate-payers in any County, Parish, or District or Municipality determine to provide for the support of Schools therein by assessment, with a provision that any District School supported by assessment shall be free to all the children residing therein. As these latter sections do not touch the questions we are discussing, it is unnecessary to refer to them more particularly. This Act was amended by the Act 26th Vic. cap. 7, which, however, merely gives to the Board of Education authority to order a re-division of Districts improperly divided, and to limit the number of teachers, &c. This, then, was the state of the Law relating to Parish or Common Schools at the time of the passing of "The British North America Act, 1867," and continued so until repealed by 'The Common Schools Act, 1871'; and because it is alleged that rights and privileges secured by or enjoyed under this Act have been prejudicially affected by The Common Schools Act, it is contended that the latter Act is void.

[1] Section 8 is as follows:—

"8. The teachers, male and female, shall be divided into three classes, qualified as follows:—

"Male teachers of the first class to teach spelling, reading, writing, arithmetic, English grammar, geography, history, book-keeping, geometry, mensuration, land-surveying, navigation and algebra; of the second class—spelling, reading, writing, arithmetic, English grammar, geography, history, and book-keeping; of the third class—spelling, reading, writing and arithmetic.

"Every teacher of the first and second class, shall be qualified and enjoined to impart to his pupils a knowledge of the geography, history and resources of the Province of New Brunswick, and of the adjoining North American Colonies.

"Female teachers of the first class to teach spelling, reading, writing, arithmetic, English grammar, geography, history, and common needlework; of the second class—spelling, reading, writing, arithmetic, English grammar, geography and common needle work; of the third class—spelling, reading, writing, arithmetic and common needle work.

"Every teacher shall keep a daily register of the scholars, which shall be open for inspection at all times; a visitor's book and enter therein the visits of the Inspectors, Trustees and School Committees respectively; maintain proper order and discipline, and carry out the regulations made for his guidance.

"Every teacher shall take diligent care and exert his best endeavours to impress upon the minds of the children committed to his care, the principles of christianity, morality and justice, and a sacred regard to truth and honesty, love of their country, loyalty, humanity, and a universal benevolence, sobriety, industry and frugality, chasity, moderation and temperance, order and cleanliness, and all other virtues which are the ornaments of human society; but no pupil shall be required to read or study in or from any religious book, or join in any act of devotion objected to by his parents or guardians; and the Board of Education shall, by regulation, secure to all children whose parents or guardians do not object to it, the reading of the Bible in Parish Schools; and the Bible when read in Parish Schools by Roman Catholic children, shall, if required by their parents or guardians, be the Douay version, without note or comment."

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The Parish School Act clearly contemplated the establishment throughout the Province of Public Common Schools for the benefit of the inhabitants of the Province generally; and it cannot, we think, be disputed, that the governing bodies under that Act were not in any one respect or particular, 'denominational.' The Board of Education was the Governor and Council, with a Superintendent appointed by them. The Trustees were elected, or appointed as the case might be, as *other* Parish officers, and they were put in other respects on precisely the same footing as other Parish officers; and the School Committee was elected by the ratepayers; and in nothing pertaining to the organization, regulation or government of the Schools, had any class of persons or denomination whatever, as such, the slightest voice or right of interference—the Board of Education, on behalf of the inhabitants of the Province at large, being responsible for the general working of the system, and the Trustees and School Committees having the management and direction of certain matters, under the Board of Education, in the particular localities for which they were respectively elected, but without reference, so far as can be gathered from the Statute, in any or either case, to class or creed.

The schools established under this Act, were, then, Public, Parish or District Schools, not belonging to or under the control of any particular denomination; neither had any class of persons, nor any one denomination—whether Protestant or Catholic—any rights or privileges in the government or control of the schools, that did not belong to every other class or denomination, in fact, to every other inhabitant of the Parish or District; neither had any one class of persons or denomination, nor any individual, any right or privilege to have any peculiar religious doctrines or tenets exclusively taught, or taught at all, in any such school. What is there then in this Act to make a school established under it a denominational school, or to give it a denominational character? A good deal has been said as to the intention of the Imperial Parliament in using the words "denominational schools," in subsection (1). There seems to be no difficulty in giving a legal construction or definition to these words, if they are read in their ordinary sense. It is a well established canon of construction, that an Act is to be construed according to the ordinary and grammatical sense of its language, if precise and unambiguous; and it is likewise a rule established by the highest appellate authority, that the language of a statute taken in its plain, ordinary sense—and not its policy or supposed intention—is the safer guide in construing its enactments. See *Philpott* v. *St. George's Hospital.*[1] And in the great *Sussex Peerage Case,*[2] the Judges declared the law to be, that

[1] 6 H. L. Cas. 338; 3 Jur. N. S. 1269. [2] 11 C. & F. 86; 8 Jur. 793.

if the words of the Act are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense; that the words themselves do in such case best declare the intention of the Legislature.

The 5th paragraph of section 8, of the Parish School Act, has been very strongly relied on, as establishing a right in respect to denominational schools. Under that paragraph, the teacher is most certainly enjoined to take diligent care, and exert his best endeavours to impress on the minds of the children committed to his care, *the principles of Christianity, morality, &c., &c.* As we think it cannot be denied that the Schools under this Act were to be Public Parish Schools, for the benefit of all the inhabitants of the Parish or District in which they might be established, and the pupils attending the schools would necessarily, in a vast majority of cases throughout the Province, be children of parents belonging to different denominations; can it be supposed, with any reason, that the Legislature could have intended that the teacher, who might possibly himself belong to a persuasion differing from all his pupils, should impress on the minds of his pupils the principles of christianity, by instructing each one in the peculiar doctrines of the denomination of its parents? Still less, do we think it could have been intended, that the principles of christianity to be impressed, should be those of a denomination to which any of the pupils did not belong, simply because they might happen to be those of a denomination to which the teacher, or even a large majority of his pupils, may have belonged. It seems to us, that, in view of the entire scope, object and policy of the Act, the duty imposed on the teacher by the 5th paragraph of section 8, was a duty outside of the Educational teaching of the school, (which is specifically provided for in paragraphs 1 & 2), to be performed as opportunities occurred, by precept and example, rather than by any direct or continuous system of dogmatic teaching; that the principles of christianity, honesty, &c., to be impressed, were to be principles of general applicability, interfering with the peculiar religious views of none;—doctrines, precepts, and practices, which all christian people hold in common, rather than the dogmatic teachings or tenets of a particular denomination or sect. This view would seem to be strongly confirmed by the last clause of the 5th paragraph, because, while under the first clause of that paragraph, the duty referred to is to be discharged by the teacher in respect to all the children committed to his care, without any exception in favor of any class or creed; the provision in the last clause is—"but no pupil shall be required to read or study in or from any religious book, or join in any act of devotion objected to by his parents or guardians," leaving the duty still on the teacher "to impress on

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the minds of the children committed to his care, the general principles of christianity, morality, justice, a sacred regard for truth and honesty, &c., &c.;" and the paragraph ends by providing that the Board of Education shall, "by regulation, secure to all children whose parents or guardians do not object to it, the reading of the Bible in Parish Schools; and the Bible, when read in Parish Schools by Roman Catholic children, shall, if required by their parents or guardians, be the Douay version, *without note or comment.*" This paragraph, so far from making the schools denominational, or giving any rights or privileges in respect to a denominational school, appears to us to be directly opposed to the idea of denominational teaching in the schools. Does not the very last clause, (that most relied on at the argument), permitting the use of the Douay version, by the addition of the words "without note or comment," shew, that with the Bible read from that version, no denominational views of any kind shall be put forward; and is not the whole in this view entirely consistent with the exclusion from the School Library, and from use, of all works on controversial theology? But it has been said, that under the Parish School Act, schools were in fact established in certain localities where all, or a large majority of the rate-payers, happened to belong to one particular persuasion, in which the catechisms of particular Churches were taught, prayers peculiar to a particular religious body were used, and books inculcating the doctrines, views and practices of a particular denomination were used as Class Books; and that these school were therefore denominational, and consequently the class of persons belonging to any such denomination had a legal right or privilege with respect to denominational schools. Assuming what is alleged to have been the case,—though on this point we have no information before us of which we can take judicial notice,—surely it is begging the whole question. How can the mere fact, that, in exceptional cases, certain schools under the Parish School Act, drawing Provincial aid, may have been made for the time being, with or without the knowledge or sanction of the Board of Education, denominational, by reason of the teacher instructing the children exclusively in doctrines of a particular denomination, or using the prayers or books, or daily teaching the catechism peculiar to such denomination, confer any legal right or privilege on any class of persons with respect to denominational schools, or give the denomination whose tenets may have been so taught in any such schools, rights or privileges other than those possessed by all and every the humblest inhabitant of the Parish in which such school existed, free and independent of all denominational connection?

It is not by what the Board of Education, Superintendent,

Inspectors or Trustees may have done or allowed to be done under the Act, nor is it from the mode in which the principles of Christianity may have been actually practically taught in one or a hundred schools which may have drawn public money under the Parish School Act, that the question in a legal view must be determined: we must look to the Law as it was at the time of the Union, and by that, and that alone, be governed. Where then do we find any legal exclusive right or privilege conferred on any denomination to any school established or that might be established under that Act; or any right or privilege conferred on any class of persons to deal with such a school as belonging to such persons as a class or denomination; or as being under their control as such; or that as a class they had any right to have taught therein, the peculiar doctrines of their denomination? The assumption that the character or status of the school could be legally altered or affected, or rights gained by reason of the religious opinions or feelings of the inhabitants of a District, or a majority of them, because in such a case Trustees and a School Committee might perchance be elected from a particular denomination, and so that then the school might be made denominational, is in our opinion entirely erroneous. To the Board of Education is entrusted the controlling, governing power. By those rules and regulations, made and ordained within the letter and spirit of the Act, must all acts under them be controlled and governed, wholly independent of the religious opinions of the electors of the District, or of the Trustees elected by them. It appears to us, then, that in passing the Parish School Act, the Legislature contemplated a general system of Education for the benefit of all the inhabitants of the Province, without reference to class or creed; that such schools were to be organized, regulated and governed by public bodies not owing their existence to, or being in any way under the control of any class or denomination; that the Act made no provision for any schools established thereunder being denominational, and did not provide that any sect or denomination whatever, as such, was in any such schools to have control or precedence, nor in any way give or recognize any right in any class of persons to have in the schools established thereunder, the doctrines, precepts or tenets of their denomination taught as part of the system of instruction, or to have such schools in any other respect denominational in their character. That with reference to religion, the Act simply recognized the duty of impressing on the minds of the pupils the general principles of christianity, honesty, &c., common alike to all christians; and simply required to be secured by regulation the reading of the Bible as the inspired Word of God, accepted by all Christians as the basis of their faith, securing always to the Roman Catholics the use, when read by Roman

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Catholic children, if required by their parents, the version recognized by their Church, but without note or comment; but at the same time, with the greatest apparent caution and scrupulous care, lest the religious principles of any should be interfered with, providing that even with respect to the inculcating of the principles of christianity, morality, &c., as indicated, no pupil should be required to read or study in or from any religious book, or join in any act of devotion, objected to by his parents or guardians. And so, even with respect to the reading of the Bible, it is to be secured only to those children whose parents and guardians do not object. If, then, the establishment of denominational schools, or the teaching of denominational doctrines, was not recognized or provided for by the Act, and the Roman Catholics had therefore no legal rights, as a class, to claim any control over, or to insist that the doctrines of their Church should be taught in all or any schools under the Parish School Act, how can it be said (though as a matter of fact such doctrines may have been taught in numbers of such schools) that as a class of persons they have been prejudicially affected in any legal right or privilege with respect to "Denominational schools," construing those words in the ordinary meaning, because, under 'The Common Schools Act, 1871,' it is provided that the schools shall be non-sectarian?

But it is contended in this case, that the words "Denominational schools" were not use by the Legislature, and should not be construed by us, in their ordinary grammatical sense and meaning, but should have a much broader interpretation. While freely admitting that, though the general rule is, that every word must be understood according to its legal meaning, in construing an ordinary, as opposed to, a penal enactment, where the context shews that the Legislature has used it in a popular or more enlarged sense, Courts will so construe the language used; we are at a loss to discover anything in "The British North America Act, 1867," indicating a legislative intention of using the words otherwise than in their ordinary meaning. It is clear enough that the reference in sub-section 2 to separate and dissentient schools in Ontario and Quebec, is especially to schools of Protestants and Catholics; and it is, perhaps, equally clear that sub-section 3 applies only to schools of a like character existing in any of the four Provinces. But we are at a loss to understand why sub-sections 2 & 3 should be held to control or in any way limit or affect a previous distinct enactment, couched in plain and unambiguous language, and which, by quite as clear and unequivocal terms, has relation to all classes of persons or denominations, and to all the Provinces of the Dominion; or why, because separate and dissentient schools, as between Protestants and Roman Catholics, not only in Ontario and

Quebec, but in any Province in which they may exist at the Union, or be thereafter established, are provided for and protected, therefore we must necessarily infer therefrom, that in using the term "Denominational schools" in sub-section 1, the Legislature intended to legislate only as between Roman Catholics and Protestants, and ination" or "denominational," as generally used, is in its popular ordinary acceptation of the term. We think that the term "denomination" or "denominational," as generally used, is in its proper sense more frequently applied to the different denominations of Protestants, than to the Church of Rome; and that the most reasonable inference is, that sub-section 1 was intended to mean just what it expresses, viz., that "any," that is, every "class of persons" having any right or privilege with respect to denominational schools, whether such class should be one of the numerous denominations of Protestants, or Roman Catholics, should be protected in such rights. If it had been intended that the clause was to be limited in its application to Roman Catholics and Protestants, only as dissentient one from the other, and apply to schools other than those usually understood as denominational schools, is it not fair to presume that the Legislature would have used some expression in the sub-section itself indicating such a particular sense, especially as we have seen there were at the Union, in this Province at any rate, strictly denominational schools, both Protestant and Roman Catholic, to which such a clause would be applicable; and for the very reason also, that when dealing with schools as between Protestant and Roman Catholic in sub-sections 2 & 3, the language clearly confines it to those bodies respectively?

But assuming that the term "Denominational Schools" is not to be construed in what has been called its narrow signification, perhaps the most favorable position to assume would be, to read the sub-section 1 as meaning substantially that nothing in any such law shall prejudicially affect any right or privilege which any class of persons, as a denomination, had by law with respect to schools in the Province at the Union. Let us endeavour to ascertain whether in such a case we would be justified in pronouncing the Common Schools Act, 1871, *ultra vires,* and therefore void.

Except in the matter of compulsory taxation, there is no very great difference in principle, that we can discover, between the Parish School Act of 1858 and the Common Schools Act of 1871. The general government, superintendence and control of the schools, are, under both laws, vested in a Board of Education almost similarly composed, the only difference being, that to the Governor and Council and Superintendent, is added the President of the University, under the latter Act; in fact, the power to make

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Regulations for the organization, government and discipline of the Schools, appointment of Examiners of Teachers, and the power of granting or cancelling licenses, and of making such Regulations as may be necessary to carry into effect the Act, and generally to provide for any exigencies that may arise under its operation, are precisely the same in both;—(See sec. 4, paragraphs 3 to 10, of the Parish School Act, and sec. 6, sub-sections 4 to 8, of the Common Schools Act): and the details are to be carried out by a Superintendent, Inspectors and Trustees, alike substantially under both Acts; and the duties and powers of these officers do not in principle substantially differ. But there are, of course, differences. Those relied on are, that the Common Schools Act has no enactment similar to section 8 of the Parish School Act; that the Parish School Act had no enactment similar to Section 58, sub-section 12, of the Common Schools Act; and this section, it is alleged, prohibits the granting Provincial aid to any but Schools under the Common Schools Act; and that by the 60th section of the Common Schools Act, all schools conducted under its provisions shall be non-sectarian—a provision not to be found in the Parish School Act; and it is contended, that the omission in the one case, and the express enactment in the other, prejudicially affect the rights and privileges which the Roman Catholics, as a class of persons and a denomination, had in the schools established or which might have been established under the Parish School Act; in other words, that the rights and privileges which they had under the one, the omission and the enactments referred to prevented their claiming or obtaining under the other.

With reference to the omission: The Parish School Act no doubt declares that the Board of Education shall secure to all children whose parents do not object, the reading of the Bible, and that when read by Roman Catholic children, if required by their parents, it shall be in the Douay version, without note or comment. Here, we have expressly directed to be secured to all children, what many persons no doubt consider a great right and privilege; and Roman Catholic parents have a great right secured to them, viz., to have, if they require it, a particular version of the Bible read. As to the reason why a similar provision, securing these important rights, in which Protestants and Catholics were both interested, was excluded from the Common Schools Act, it is not our business to inquire; what we have to determine is, does this omission make the Law void, if in other respects unobjectionable? We think not. If this was a right or privilege which existed at the Union, the Legislature certainly have not protected it by any express enactment. But is the right taken away? May it not still exist, provided always, it is a right which legitimately comes under sub-section 1, section 92? Because that section declares that nothing

in any such Law shall prejudicially affect any such right; and in such case, reading the Common School Law by the light of this section, would it not be the duty of the Board of Education under the Common Schools Act, instead of making Regulation 21, declaring as follows:—that "It shall be the privilege of every Teacher to open and close the daily exercises of the school by reading a portion of Scripture (out of the Common or Douay version, as he may prefer), and by offering the Lord's Prayer—any other Prayer may be used, by permission of the Board of Trustees; but no teacher may compel any pupil to be present at those exercises, against the wishes of his parents or guardian, expressed in writing, to the Board of Trustees;" to secure by Regulation, just what the Board of Education were bound to secure under the Parish School Act of 1858; that is, to make just such a Regulation as the Parish School Act required to be made? We have seen they have precisely the same, and only the same powers to make Regulations, as the Board had under the Parish School Act. By this simple means, the rights of all the children and their parents in the Province—as well Protestants as Roman Catholics—which existed at the Union, would be preserved, and all just cause of complaint on this head removed. Why the Board of Education should have departed from the principle and policy of the Parish School Act, and taken from the parents of all the children of the country—Protestant and Roman Catholic alike—the great boon and privilege of insisting on the Bible being read in schools, as they have done, and should have conferred on the teacher, not only the privilege of reading the Bible or not as he likes, but out of the Common or Douay version—not as the children or their parents may choose, but as the teacher may prefer, though he cannot compel the attendance of the pupils,—is not for us to attempt to explain; we simply point out the fact. But if the right secured by the Parish School Act is protected by 'The British North America Act, 1867,' we fail to see, because the Board of Education may not have made such a Regulation as they ought in such case to have made, or have made a Regulation they ought not to have made, that the action of the Board, or its non-action, can render the Act of the Legislature inoperative.

If the right and privilege falls under section 93, and if there is no power to compel the Board of Education to make such a Regulation, or the Legislature should have inserted a clause in the Common Schools Act(requiring them to do it, is not this just a case where sub-section 4, of section 93 of 'The British North America Act, 1867,' applies? viz:—"In case such Provincial Law, as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section is not

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made, then as far only as the circumstances of the case may require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section." In this connection we may refer also to the 20th Regulation, which, it has been contended, prejudicially affects the rights and privileges which the Roman Catholics had under the Parish School Act. This Regulation declares that "symbols or emblems distinctive of any national or other society, political party, or religious organization, shall not be exhibited or employed in the school room, either in its general arrangements or exercises, or on the person of any teacher or pupil." It may be, that the Board of Education have disregarded the general policy of the Common Schools Act, and interfered with the rights of teachers, parents and children, in excluding from the schools alike teachers and pupils, who may exhibit on their persons, in dress or ornament, symbols or emblems distinctive of any national or other society, political party, or religious organization: for, however clear the right of the Board of Education may be to make regulations necessary for the good government and discipline of the schools; to make arbitrary, restrictive regulations, as to the dress or personal adornment of the teachers and pupils, or which are calculated, unnecessarily to interfere with the feelings, national, social or religious, in matters not calculated to give any just cause of offence to others, or to interfere with good order in the schools, is quite another question. And while it is by no means clear to us, that any power exists in the Board of Education, under the Common Schools Act, by regulation, to deprive teachers, parents and children, of their right of access to the Free Schools of the country, to the support of which they, and all others, are forced to contribute, unless they submit to such regulations; and though the assumption of such a power of practical expulsion by the Board of Education raises a question involving important and delicate rights,—rights which, in this land of civil and religious freedom, few may be willing to see infringed—or at any rate, raising discussions which must be unpleasant to those engaged in them, and calculated to result in consequences which can scarcely fail to produce acrimonious feelings, and in the end be injurious to the cause of Free Education, which we must presume the Regulation objected to was intended to further; all we can say is, as the case stands, the Regulations are not before us in such a way that we can deal with them, and therefore we are not called upon to express any decided opinion as to their validity, because the constitutionality of the Act cannot, in our opinion, be affected by any regulation made under it, there being nothing unconstitutional in the Act itself, that we can discover.

The second objection is easily answered. The provision in sec. 58, sub-sec. 12, of the Common Schools Act, declaring that no

public funds shall be granted, would seem to apply to the schools particularly referred to in the preceding part of that section, and not to all schools. But, if it was intended to apply generally to all schools, as Mr. *Duff's* argument assumes, what does it amount to? It cannot take from the Legislature the right to make such grants. Thus, we see in the Estimates of the year 1872, grants were recommended by the Lieutenant-Governor, and no doubt made, for all the denominational schools before specifically referred to, (see Journals of House of Assembly, page 124); and if such a clause was *ultra vires,* and we declared it void—*cui bono?* It would not affect the other parts of the Act, and what would practically be attained? The Legislature could, whether the clause stands or is declared void, do just as it pleases about granting or withholding the public funds.

But it is contended that the 60th section declaring "that all schools conducted under the provisions of this Act shall be non-sectarian," prejudicially affects the right and privileges which the Roman Catholics, as a class, had in the Parish Schools at the time of the Union. It cannot be denied that to the Provincial Legislatures is confided the exclusive right of making laws in relation to Education; and that they, and they only, have the right to establish a general system of education, applicable to the whole Province, and all classes and denominations, provided always they have due regard to the rights and privileges protected by section 93 of 'The British North America Act, 1867.' Now, what in this case, is the right or privilege claimed to have been prejudicially affected? Is it a legal right or privilege that could have been put forward and enforced by the Roman Catholics, as a class, under all circumsatnces and in every Parish or Common School; or is it a legal right confined to the Roman Catholics as a body; or does it belong equally to all and every of the other denominations of Christians in this Province, and capable by them of enforcement; or, on the contrary, was it not the mere possible chance of having religious denominational teaching in certain schools, dependent entirely on accidental circumstances; as, on what might happen to be the religious views of the majority in the Parish, and then on the accidental result the election of Trustees and School Committee, and on the views of the parties so elected, as to religious denominational teaching, and their willingness to permit it in the schools, (admitting that the Trustees or Committee had any discretion in the matter, which perhaps is more than doubtful); was it not also dependent on the Board of Education, who had the general controlling power? If dependent on circumstanes such as these, how can it be considered such a legal right as could have been contemplated by the Imperial Parliament in passing the 93rd section of 'The British North America Act, 1867,? Where is there any thing that can, with any propriety, be termed a legal right? Surely the Legislature must

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have intended to deal with legal rights and privileges. How is it to be defined—how enforced?

It by no means follows as a necessary legal consequence, that because a majority of the inhabitants of a Parish or School District may belong to a particular persuasion, they would necessarily vote for Trustees favourable to denominational teaching, nor could they be compelled by any legal process so to vote; nor does it follow that Trustees when elected even by a majority of one denomination, would necessarily prove favourable to denominational teaching; and by what legal process could they be constrained to assent to its introduction in the schools? And again, suppose up to this point all were favourable, might not the whole scheme be ignored by the Board of Education; and how then could any class of persons, as such, no matter to what denomination they may belong, claim of right to control or direct the acts or doings of any of these parties; or how could Electors, Trustees, School Committees, or the Board of Education, be compelled to make any school in any sense denominational, or in other words, to confer on any such class, denominational rights? Surely the rights contemplated must have been legal rights: in other words, rights secured by law, or which they had under the law at the time of the Union. If any such existed, they must have been capable of being clearly and legally defined, and there must have existed legal means for their enforcement, or legal remedies for their infringement, for it is a clear maxim of law, that *ubi jus, ibi remedium.* It was said long ago in a celebrated case, that if a man has a right, he must have a means to vindicate and maintain it, and a remedy if he is aggrieved in the exercise and enjoyment of it; and that it was indeed a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal. What possible legal means could any denomination have invoked under the old Parish School Act, to compel any one school to be made denominational, or to require and insist that in any one school denominational tenets, doctrines, precepts or practices, should be taught or used? But then it was repeatedly urged upon us, that under the Parish School Act, circumstances might, and very often did occur, where schools might, and in numerous cases did, become denominational; but that by reason of section 60 of the Common Schools Act, such was not now possible. The answer is simply this: The inability of a class of persons to have under the Common Schools Act, that which possibly they might under certain exceptional and accidental circumstances have had under the Parish School Act of 1858, but which they had no right to insist on having, is a damage not occasioned by any thing which the law esteems an injury,—a kind of damage termed in law, *damnum absque injuria*, and for which there is no remedy. And so, in

this case, as there was no legal right to have denominational schools or denominational teaching, there is no injury in legal contemplation committed by the Legislature dealing with the question in such a manner as to prevent the possibility arising, and consequently no right to have the action of the Legislature abrogated. It may be a very great hardship, that a large class of persons should be forced to contribute to the support of schools to which they are conscientiously opposed, or be shut out from what they have hitherto, under certain circumstances enjoyed, and be without remedy; but by any such considerations, Courts of Justice ought not to be influenced: hard cases, it has been repeatedly said, are apt to make bad law; and it has also been justly remarked, that if there is a general hardship affecting a general class of cases or persons, it is a consideration for the Legislature, not for a Court of Justice.

FISHER, J. I concur in the judgment of my brethren, as to the constitutionality of The Common Schools Act, 1871; but as there are some sentiments in it in which I do not agree, I have thought in a matter of so much delicacy and importance, is was better to read the judgment that I had written, than attempt to qualify opinions which my brethren had so fully considered.

The right to impose this assessment is objected to on the ground that it includes a sum for the support of schools under the authority of the Act relating to Common Schools, 34 Vic. cap. 21, which it is contended is unconstitutional; that the Legislature have no power to pass it, because it contravenes the exception in the Act of the Union.

The exclusive power of legislating upon the subject of Education is, by the 93rd section of that Act, conferred upon the Legislature of each Province, subject to the reservation of the rights of any class of persons with respect to denominational schools.

Every one acquainted with the history of the Provinces which comprised Canada before the Union knows the reason for the insertion of some of the provisions of this section. It was found to be the only mode of solving a question that had caused serious difficulty with the Government and Legislature of that Province.

Paragraphs two and three were constructed to soothe and settle these difficulties, and at present only apply to that Province, now consisting of Ontario and Quebec, where schools were in operation at the Union, answering the description given them in these paragraphs.

Whether the fourth paragraph applies to any other law than such as is referred to in the third paragraph, it is not necessary to consider, as the constitutionality of the School Act depends entirely upon the meaning of the first paragraph.

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The simple question for solution is, does The Common Schools Act, 1871, prejudicially affect any right or privilege with respect to denominational schools, which any class of persons had by law in the Province at the time of the Union? It is not merely a right or privilege. A denominational right or privilege, of itself, if any such existed, would not alone make The Common Schools Act unconstitutional. It must be a right or privilege with respect to a denominational school, which a class of persons had by law at the Union, which is prejudicially affected by this Act, to render it unconstitutional.

It appears to me, that the first enquiry is—What is a denominational school? In my opinion, it is a school under the exclusive government of some one denomination of Christians, and where the tenets of that denomination are taught. But assume that a school answering either of these requisites is a denominational school, and this is the lowest ground upon which it can be put, and then examine the laws in force at the time of the Union, to ascertain if any such school then existed by law, and if the right of any class of persons therein has been prejudicially affected by the Common Schools Act. There were denominational schools at the Union, such as the Varley School in Saint John, the Sackville Academy, the Madras School, and the like, but they are not touched by The Common Schools Act, 1871; they remain in the enjoyment of all the rights they had at the Union. The Act 20 Vic. cap 9, intituled "An Act relating to Parish Schools," with some unimportant amendments not affecting the present question, was in force at the Union. As it has been superseded by The Common Schools Act, 1871, which is objected to, we must refer to its provisions to ascertain whether it authorized any denominational school; for if it did not, then the Act under consideration has not in any of its provisions prejudicially affected any right or privilege any class of persons enjoyed at the Union. The very title of the Act proclaims its unsectarian character as fully, to my mind, as the positive enactment of the Act of 1871, that the schools conducted under its provisions should be non-sectarian—a useless provision in an Act which alone provided for the establishment of such schools. Parish schools, that is, schools in and for every Parish in the Province, according to the political division of the Province into Counties, Towns, and Parishes, distributed and sustained by public aid according to the population and extent of each Parish,—the number and classes of the schools must, in the very nature of things, be other than denominational. I will now refer to the provisions of the Act, and see if there is any authority for the establishment of a denominational school under it, or any countenance in the Act for such a school. The Governor in Council appoints the Superintendent of Schools, who, with the

Governor and three members of the Executive Council, constitute the Board of Education. The inspection of the schools is done altogether by political agency. The Governor in Council is authorized to divide the Province into four districts, and appoint one Inspector for each district. The Board of Education, a purely political body, make rules and regulations for the organization and government of the schools, and such other regulations as may be deemed necessary to carry the Act into effect. There was no restriction whatever upon the power of the Board in this respect. The Board regulates the mode of licensing, examining, classifying, and paying the teachers, and prescribes the duties of the Inspectors. The Superintendent, a political officer, has the general direction and supervision of the schools, subject to the order of the Board. Each Parish was to be divided into school districts by three Trustees annually elected by the rate-payers, at the same time and in the same manner as other Town or Parish officers were elected, and subject to the same penalties and disabilities, with the same provision for appointing them, in case of failure in the election. They employ the Teachers, and may dismiss them, subject to an appeal to the Board of Education. They are to examine the schools, and apportion the money raised by assessment, when so raised, amongst the different schools. Each school was under the immediate supervision of a School Committee elected annually by the rate-payers of the district. They were empowered to admit free scholars, and children of poor parents at a reduced rate. The law also provided for a Superior School in each Parish, thus also supplying the means for higher education. The teachers, both male and female, were divided into three classes, with an appropriate allowance to each class from the Provincial Treasury, and with duties, as to the subjects taught, prescribed in the Act for each class. It provided for a School Library in each district, by a money grant in aid of the amount raised in the locality for that purpose, and placed the selection of books under the control of the Board of Education; but expressly excluded works of a licentious, vicious, or immoral tendency, or hostile to the Christian religion, or works on controversial theology. This is the only part of the law in which any thing of a denominational character is referred to in any way; and it shews how jealous the Legislature was in guarding the law, and in preserving the schools from any denominational or sectarian tendency. Provision was made for the education of the children of the whole people, in schools of every grade, and by teachers of both sexes; and by the Superior School, the wants of higher education were provided. The whole machinery of the Act is designed to make the schools common to the child of every man, irrespective of his religious opinions. The Act recognizes the agreement of the inhabitants of any locality with a teacher licensed by

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the Board of Education, when they have provided a sufficient school house and secured the necessary salary, raised by voluntary contribution or tuition fees. It contains provision for voluntary assessment in the District, Parish or County where the rate-payers determine to adopt that mode of supporting the schools; and in such case the schools are declared to be free to the children of all the inhabitants. The system is prescribed by the Board of Education; the localities take an active part in the establishment and government of the schools, subject to the general control of the Government. The local agency is exercised, and the local officers appointed, in the same manner as for the government and support of the poor, the highways ,or any other local or parochial object. Neither class, creed, nor colour, affect or influence the one more than the other. The only qualification for the electors of any officer is that they are to be rate-payers upon real or personal property, or income. No class or creed had, under the Act, any peculiar right, either in the general government of the whole Province, or in any Parish or school. Now, when all this machinery for working the Act relating to Parish Schools had been made, is it not a striking proof of the determination of the Legislature to avoid the very thing which it is contended the Act authorizes; by restricting the power of the Board of Education to make Rules and Regulations in this respect, and expressly excluding from the School Libraries works hostile to the Christian religion, or works on controversial theology; while it left the inhabitants free to elect their local agents, who should employ their teachers, and look after the schools. To secure to every man, and the child of every man, a just equality with regard to his religious faith, it enacted, in effect, that the great leading principles of Christianity should be inculcated in the schools; but there should not be in the Library a book upon controversial theology, or, in other words, with denominational teaching. What sort of denominational school would that be, where the master would not be aided in his dogmatic teaching by the writings of men of his own faith? When a denominational school is established, how strictly this is provided for. Take any one of the Acts on our Statute Book, and examine its provisions. I will refer to the Act incorporating the Trustees of the Wesleyan Academy at Mount Allison, Sackville, (12 Vic. cap. 65); the 11th section is as follows:—"No person shall teach, maintain, promulgate or enforce any religious doctrine or practice in the said Academy, or any other department thereof, or in any religious services held upon the said premises, contrary to what is contained in certain Notes of the New Testament, commonly reported to be the Notes of the said Rev. John Wesley, A. M., and in the first four Volumes of Sermons, commonly reported to have been written and published by him." Take the Charter of the

Madras School, or any other Act, and the same strict provision for dogmatic teaching is made. I pass by the Colleges, which were referred to by the Counsel on the argument on this rule, as not material to the inquiry, if they are within the category contended for. I can hardly imagine any stronger illustration of the principle that pervades the whole Act relating to Parish Schools, than the language of the eighth paragraph of the fourth section, which thus restrains the legislative power of the Board of Education. It is as follows:—"To provide for the establishment, regulation, and government of School Libraries, and the selection of books to be used therein; but no works of a licentious, vicious, or immoral tendency, or hostile to the Christian religion, or works on controversial theology, shall be admitted." It has been urged that the sixth paragraph of section 8 countenanced denominational teaching. I think no one can read that section, and fail to discern that it enacts the very contrary. The words of the paragraph are:—"Every teacher shall take diligent care, and exert his best endeavours to impress on the minds of the children committed to his care the principles of Christianity, morality, and justice, and a sacred regard to truth and honesty, love of their country, loyalty, humanity, and a universal benevolence, sobriety, industry and frugality, chastity, moderation and temperance, order and cleanliness, and all other virtues which are the ornaments of human society." Surely it cannot be disputed that this can be done without any denominational teaching, or, in the language of the Statute, without entering upon controversial theology. There are certain great fundamental principles of Christianity, common to all, that may be enforced, without trenching upon debatable ground. Take the Sermon on the Mount, or any of the lessons of the Great Teacher himself, for example. To avoid any abuse of this duty or privilege of the teacher in the Parish Schools, the Legislature proceeds further to enact—"but no pupil shall be required to read or study in or from any religious book, or join in any act of devotion objected to by his parents or guardians." Here is a positive enactment against denominational teaching. Knowing it to be possible for a designing teacher, under colour of the authority to impress upon the minds of the children the principles of Christianity, and all other virtues, stealthily to teach doctrines of a denominational or sectarian character, and to protect the child from the influence of such teaching, the parents are empowered to interfere and withdraw the child from any such teaching, or from joining in any act of devotion having such a tendency.

The paragraph then proceeds thus—"and the Board of Education shall, by regulation, secure to all children whose parents or guardians do not object to it, the reading of the Bible in Parish Schools." What is there denominational in thus inculcating the

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principles of Christianity, and all other virtues which are the ornaments of human society? What better mode could be adopted than by reading portions of the Bible? It certainly is not a denominational book. It is the common standard of faith and practice to all Christians. To it they all appeal. Where are such ennobling thoughts as in the Bible? It is said to be an historical fact, that when the question of reading the Bible in the Common Schools of one of the Cities on this Continent was debated, the Jews voted for it, on the ground that it was well adapted to the instruction of children, because of the sublime principles of morality it contained. Though the Bible is regarded as the great charter of our salvation, as the revelation of the will of God to man, eminent Divines in one branch of the Church Catholic object that some words, some expressions, some sentences, are incorrectly rendered in our ordinary English version, and recognize another version as being a more correct interpretation of such words, expressions, and sentences. The Legislature, with the same object of preventing any denominational right, enacts—"and the Bible, when read in Parish Schools by Roman Catholic children, shall, if required by their parents or guardians, be the Douay version, without note or comment"; the very words "without note or comment," of themselves, are significant proofs of the intention of the Legislature. Assuming that the Bible is a denominational book, and I cannot think any one will seriously contend that it is, and that this provision created a right—a denominational right if you please—that will not help the *ultra vires* argument, because if it were so, it is a right or privilege which a class of persons had by law at the Union, to have the Bible read in a Parish School, not in a denominational school, and that it is not a right secured by 'The British North America Act, 1867,' even if it existed. I have endeavoured to ascertain the true construction of the Act relating to Parish Schools, as the only Act affecting the question; I include the amendments, which are not important. Every other Act which confers upon any denomination a right or privilege with respect to denominational schools,, is left unrepealed, so that no right or privilege enjoyed by any class of persons under any such Act is prejudicially or in any way affected by the Act under consideration.

I will now refer very briefly to the 34th Vic., cap. 21, intituled "An Act relating to Common Schools." It is substantially the same as the Act of 1858, relating to Parish Schools. The Board of Education is the same, with the addition of the President of the University. It has the same large powers. The duties of the Superintendent are the same. The number of Inspectors is increased, with smaller districts for each, but with duties very similar to what they discharged under the old law. The Trustees are appointed in the same manner as under the old law, and dis-

charge much the same duties, including the duties of the School Committee. The Teachers are classified and paid as in the old law. Superior Schools are provided for, and Libraries, upon the same principle. The only real difference that I can discover, arises from the different modes of supporting the school. Under the Act of 1871, the portion of the support furnished by the inhabitants is raised by assessment; and in the machinery and provision necessary for working this out, and the different modes of paying and supporting the schools, that it involves, is the only difference. In other respects, this Act provides for the attainment of the same object by the same means. It is said that there is no provision requiring the reading of the Bible in the schools. The Board of Education may by Regulation provide for it, as in the Act relating to Parish Schools. It it were otherwise, it would not help the *ultra vires* argument, unless the schools could be shewn to be denominational.

Upon the argument, it was contended that some of the Regulations interfered with the rights of a class of persons. I confess I was unable to discover the bearing of that argument upon the question. How, if the Law were good, a bad Regulation—if such there was—would affect it? Assume that this contention is correct, and that it prejudicially affects the right that a class of persons had at the Union, such a right, if it existed, is not saved by 'The British North America Act, 1867;' because it would be a right or privilege with respect to a Parish School, and not to a denominational school. I cannot discover that the Regulations have any thing to do with the question of the power of the Legislature to pass the Act, or can form any guide in the interpretation of it. It appears to me that under either of the Acts of 1858 or 1871, it was competent for the Board of Education to make any of the Regulations referred to; whether they exercised their powers wisely or unwisely, under the Act of 1871, is another question. The propriety of the Regulations objected to is a question of public policy, upon which I am not called upon to express an opinion. I may, as an individual, entertain a very strong opinion as to its policy. As a Judge, all I feel called upon to do is to consider its legality, and for myself, on that point, I entertain no doubt. I am therefore of opinion that the Rule should be discharged.

WETMORE, J. While fully concurring in the opinion of my learned Brethren as to the constitutionality of 'The Common Schools Act, 1871,' I do not wish to be understood as expressing a participaton in any doubt whatever as to the Regulations of the Board of Education. I think the only question properly before the Court is as to the Act itself, and not as to the Regulations. We are only called upon to decide whether or no, the Schools Act, or any part of it, is *ultra vires:* and upon the decision, the assessments, to set which aside the application is made, are to be affected.

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If the Act itself is not *ultra vires,* I do not see how the promulgation of any Regulation, even supposing it to be one which the Schools Act would not warrant, or to be in violation of the provisions of section 93, sub-section 1, of 'The British North America Act, 1867,' can affect the case any more than assessors acting in violation of the law under which an assessment is imposed, would affect the law authorizing the assessment. In such case, if the assessment is imposed in a manner not warranted by law, parties aggrieved would have their remedy for obtaining relief; and so, with reference to a Regulation sought to be established by the Board of Education. If that body should exceed the power given by law in such case, the Regulation would not have the support of law to uphold it, and therefore could not be maintained; but the law, nevertheless, would remain in full force and authority. The application to this Court is simply to set aside an assessment in consequence of the invalidity of the law; it does not touch the Regulations; and though they have been referred to by counsel in the argument, it does not seem to me they are before us in such a way as to call for a decision, or the expression of an opinion upon any one of them. Indeed, I do not see that a most positive and direct expression by the Court, as to the legality or illegality of any of the Regulations, would in the slightest degree affect the constitutionality or unconstitutionality of the law; and I therefore purposely abstain from expressing my opinion upon any one of the Regulations. Should a question arise respecting the Regulations, or should a decision upon them be necessary for any other matters before the Court, then, of course, I would be required to express my opinion; until it does arise, I decline doing so: to use an expression of COCKBURN, C. J., in *Rimini* v. *Van Praagh,* (L. R. 8 Q. B. 4): "It will be time enough to do so, when the necessity arises."

Rule for a Certiorari discharged.

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February

British North America Act, 1867—Provincial Legislature—Powers of—Railways—Ultra Vires.

The Provincial Act 33 Vic. c. 47, authorized the issue of Debentures to the Houlton Branch Railway Company, to aid in the construction of a railway from Houlton, in the State of Maine, to the New Brunswick and Canada Railway in this Province.

Held, (Per RITCHIE, C. J., and ALLEN and WELDON, J. J., FISHER, J., *dissentiante.*) To be beyond the powers of the Local Legislature under the "British North America Act, 1867."[1]

This case came before the Court on an application to quash an assessment made on the Town of Saint Stephen, for the purpose

[1] Reversed on appeal to the Privy Council, March 5th. 1875.

of paying the interest on Debentures issued under the Act 33 Vic. c. 47, authorizing the issue of Debentures to the Houlton Branch Railway Company to aid in the construction of a railway from Houlton, in the State of Maine, to the New Brunswick and Canada Railway in this Province. The objection to the assessment was that the Act 33 Vic. c. 47 was *ultra vires* of the Local Legislature under the "British North America Act, 1867." The assessment having been brought before the Court on return to a writ of *certiorari*, a rule *nisi* to quash the same was obtained in Trinity term, 1872.

Oct. 23. *A. L. Palmer. Q. C.*, shewed cause, and contended:

1st. That the words "lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings, connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province," in the 10th sub-section of section 92 the British North America Act, did not mean such lines extending into the territory of the State of Maine, a foreign power, but must be taken to have applied as the whole of the Act should be, to the territory mentioned in it, and over which the Imperial Parliament had power to legislate, that is, the three Provinces of Canada, Nova Scotia, and New Brunswick, referred to in the first section, and the North-west Territories, Rupert's Land, Prince Edward Island, and Newfoundland, referred to in the 146th and 147th sections, and the lines meant are either such lines connecting one or more of those Provinces, or extending beyond such Provinces into the said territories; for, if it was extended to lines running into the United States, the language used would be absurd, for it would then purport to give the Canadian Parliament equal power to enact laws in relation to building railways in a foreign country as within its own jurisdiction—a power that the Imperial Parliament could neither exercise itself nor give to Canada. In the case of the *E. & N. A. Railway Co.* v. *Thomas*,[1] the Court has already decided that the fact of a line of railway extending beyond the Province into Maine did not make laws in relation to it made by the Local Parliament *ultra vires*, so long as

[1] 1 Pugsley 42.

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such Legislature confined its legislation within the Province. Mr. *Palmer* further urged, that the meaning he contended for was the more apparent from the fact that by the 91st section the Dominion Parliament's power is limited to the making of laws for the peace, order and good government of Canada, and that such laws must be presumed to be confined to the territory of Canada. He further contended, that his construction was apparent from what immediately followed the same words in sub-section *b*, which are as follows: "lines of steam-ships between the Provinces and any British and Foreign country." What would be the use of those words at all if the proper meaning of the words which are in sub-section *a*, "lines of steam or other ships extending beyond the limits of the Province," is not that such extending shall be confined to the Provinces and territory of Canada?

2nd. The sub-section of Section 10 is only intended to authorize the respective Parliaments to make laws in relation to railways, that is, to give power to construct and run the same, and to direct and control the mode of doing so, and has no relation to the mere encouraging such works by bonus or assistance, which is quite a different matter, and might be done to encourage railways or other works, either by the Dominion or Local Legislature, so long as they each confined their encouragement to their own funds. It was quite within the power of the Local Legislature to encourage by taxation on the inhabitants of its own Province or any part of it that it may consider benefited; and such matters are clearly included in sub-section 2 of the 92nd section which gives the Local Legislature power to make "laws in relation to direct taxation within the Province, in order to the raising a revenue for Provincial purposes?" Who is to determine what is a provincial purpose if the Local Legislature is not? Suppose the people of the Province thought that a light-house on the French Island of Saint Pierre would be a benefit to the inhabitants, neither the Local, Dominion, or even the Imperial Parliament could authorize the erection of it, and therefore could not make laws in relation to light-houses in Saint Pierre, but might not either of them make a grant to any person, conditioned that he acquired the right to do so from France, and did build such a light-house and kept it up in an efficient state, just

as either might consider it for the benefit of the Province, the Dominion, or the Empire. Such legislation could not be properly described as laws relating to light-houses in Saint Pierre. He also contended that this was a matter of a purely local and private nature in the Province, and came within the 16th sub-section of the 92nd section. The contemplated benefit was the bringing of the trade of Houlton to St. Stephen's, which is a matter of a local and private nature. That the taking of the money from the tax-payers of Saint Stephen was an interference with property and civil rights, and would come under the 11th sub-section, if it did not come under the others, and therefore the power to make laws relating thereto could not be in the Dominion Parliament. In construing the Union Act in order to determine the powers granted thereby to the different legislatures, is was important to bear in mind, that prior to the passing of the Act, the Legislature of the Province, like the Imperial Parliament, and unlike any Legislature in the United States, was supreme, there being no reserved rights in the people; that the Act did not take any powers from the Legislatures, but merely divided them between the Local and Dominion Parliaments, so as to vest some of such powers in one and some in the other, and some they have in common; and therefore, when it can be demonstrated that any power of legislation is not in the Dominion Parliament, it follows that such power must be in the Local, and, as it cannot be shewn that the Dominion Parliament has any power to tax the people of Saint Stephen for this purpose, the Local must have it, as, even if it was conceded that the Dominion Parliament had power to authorize the building of a railway from Debec to extend beyond the limits of the Province in the direction of Houlton, there is no power given any where in the Act to authorize them to impose a special tax for that purpose on Saint Stephen's, or even on the whole Province. Such legislation would be a violation of the 2nd, 13th and 16th sub-sections of the 92nd section. For these reasons it was submitted the Act authorizing this assessment was not *ultra vires* the Local Legislature, and the Rule to quash the assessment should be discharged.

S. R. Thompson, Q. C., in support of the rule. The Act in question is *ultra vires* of the Local Legislature. The 92nd section

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and sub-section 10 of the British North America Act of 1867 expressly prohibits Local Legislatures from legislating on "lines of steam or other ships, railways, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province." The local Act, under which this assessment is made, relates, in direct terms, to a railway "from the Town of Houlton, in the State of Maine," to the line of the Woodstock and St. Stephen road in this Province. How can it be argued that this Act, expressly intended to aid a foreign road connecting with a road in this Province, is not within the prohibition of the Imperial Act?

The 91st section of the Imperial Act expressly gives to the Parliament of Canada the exclusive right of legislating in respect to "The regulation of Trade and Commerce." We all know that railways materially affect trade and commerce, sometimes completely changing its course; directing it from its old channels into new ones. It may therefore be fairly presumed that for this reason, if for no other, the power of legislating on so important a matter as railroads connecting the Provinces with each other, or running from a foreign country into the Province, should exclusively belong to the Dominion Parliament: Are not trade and commerce materially affected by the Act under which this assessment is made? What legislation can be more effectual than that which authorizes the raising of money in aid of railroads such as mentioned in section 92, sub-section 10, of the British North America Act?

The case of *The Queen* v. *Chandler*[1] decides this case. The argument that "civil rights" are affected amounts to nothing. The Local Legislature can only exclusively legislate on *those civil rights, which are not exclusively vested in the Dominion Legislature.*

Whatever doubt could arise on the wording of the 10th sub-section of section 92 is set at rest by the language of section 91, sub-section 29.

Cur. Adv. Vult.

The judgment of a majority of the Court (RITCHIE, C. J., and ALLEN and WELDON, J. J.,) was now delivered by

[1] 1 Hannay, 348.

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ALLEN, J. We granted a *certiorari* to bring up an assessment in course of collection on the rate-payers within a certain district of the Parish of Saint Stephen's. That assessment having been returned, we are now asked to quash it on the same grounds on which we granted the rule for the *certiorari*. As we have not altered our opinion on the subject, it will be sufficient to state substantially what we said when granting the *certiorari*. The Act, under the authority of which this assessment was made, is the 33 Vic. cap. 47, intituled "an Act to authorize the issuing of debentures on the credit of the Lower District of the Parish of Saint Stephen's in the County of Charlotte." This Act recites, that "the inhabitants of the Town of Saint Stephens in the County of Charlotte are desirous of having direct railway connection between Houlton, in the State of Maine, and the St. Croix Railway in the County aforesaid;" that the Town of Houlton had offered the Houlton Branch Railway Company a bonus of thirty thousand dollars, upon condition that the said Company should construct and suitably equip with rolling stock a railway from the Town of Houlton aforesaid, to the line of the New Brunswick and Canada Railway and Land Company, at or near the Debeck Station, (so called), so that such railway should be completed and ready for the conveyance of passengers and freight on or before 1st of January, 1872. That the said Houlton Branch Railway Company were willing to undertake the building and construction or such connecting line of railway, &c., upon the condition that the Town of Saint Stephen did and should give to the Houlton Branch Railway Company a bonus of fifteen thousand dollars;" and that the inhabitants of that portion of the said Town of Saint Stephens, called the Lower District, and thereinafter particularly described, were willing and desirous to give said sum, and that such sum should be raised upon the credit of the real and personal property of the inhabitants of the said district, in such manner as might be thought most advisable. It then enacts in section 1, that upon the said Houlton Branch Railway Company "giving reasonable and proper security to the Justices of the Peace in General Sessions, or Special Sessions called for that purpose, that the said line of railway from Houlton to the line of the said New Brunswick and Canada Railway and Land Company, should be built and

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efficiently furnished and completed, and substantially ready and fit for the conveyance of freight and passengers, and properly provided with all necessary locomotive-engines, cars and carriages within the time aforesaid, limited for so doing, &c., &c.:" the said Justices in General or Special Sessions should forthwith issue and deliver, or cause to be issued and delivered, as a bonus to the said Houlton Branch Railway Company, certificates of debt, to be called Debentures, to the amount of fifteen thousand dollars of current money of New Brunswick, of such denomination as they may see fit, &c., with coupons annexed, bearing interest at six per cent. per annum, the principal money of said debentures to be paid in full at the expiration of twenty years from the date thereof.

Section 2 enacts, that the real and personal property of all persons, resident or non-resident, situated in the Lower District of Saint Stephen, so called, within certain bounds, (which are particularly described), "shall, each and every year during the continuance of the term of the said Debentures, be assessed for the payment of the interest on such Debentures issued under the authority of this Act; an order for which assessment shall be made by the said Justices in General or Special Sessions, each and every year as aforesaid, and levied and collected in the same manner in all respects as Parish and County rates are now, or may be hereafter assessed, levied and collected," &c.

Section 3 enacts, that "the principal money payable on the Debentures aforesaid shall be raised by assessment in the ordinary way in which County and Parish rates are assessed, levied and collected on the real and personal property of residents and non-residents situated in the lower district aforesaid, subject to be assessed; which assessment, levy and collection, the said Justices, in General and Special Sessions called for that purpose, are hereby required and authorized to order to be done, and within the period of twenty years from the issuing of the Debentures aforesaid; and such assessment, levy and collection may be ordered to be made at such time or times, and for such amount or several amounts as by the said Justices shall be deemed advisable for the payment and redemption in full of the Debentures aforesaid, or any portion or number thereof, so that the same shall be fully redeemed and paid within the period of twenty years from the issue thereof; and

the moneys so assessed, levied and collected, shall be subject to the order of the said Justices in General or Special Sessions, as to its place of deposit or appropriation, or otherwise, according to the purposes of this Act, for the redemption and payment of the said Debentures."

It was contended that this Act was *ultra vires* of the Local Legislature, and therefore void; that under "British North America Act, 1867," section 92, sub-section 10, paragraph (*a*), it was withdrawn from the class of subjects on which the Provincial Legislature might legislate; and that by force of section 91, which declares the matters over which the Parliament of Canada should have exclusive legislative authority, it belonged exclusively to that Parliament.

Under section 92, which enumerates the matters confided to the Local Legislature, we have by sub-section 10, "local works and undertakings, other than such as are of the following classes." Then follow three paragraphs, (*a*), (*b*), and (*c*), of excepted classes. Paragraph (*a*) is the only one that bears on the subject before us, and it reads thus:—"Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province."

Under section 91, which specifies the classes of subjects assigned exclusively to the Parliament of Canada, by sub-section 29, we have "such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

It was contended that the subject matter of the 33 Vict., cap. 47, came within one of such exceptions, and was, therefore, beyond the power of the Provincial Assembly.

In the case of *Regina* v. *Chandler*,[1] this Court very clearly enunciated the principles by which it should be governed, in determining cases where local legislation was attempted on matters expressly withdrawn from the Provincial Legislatures, and vested exclusively in the Parliament of Canada; and in the case of *The European and North American Railway Company* v. *Thomas*,[2] decided a short time since, we examined those portions of the

[1] Hannay, 548.

[2] 1 Pugsley 42.

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91st and 92nd sections of "The British North America Act, 1867," by which the question now under discussion must be determined. In that case we decided, that where the railway, the immediate subject of legislation, was to be constructed clearly within the limits of the Province, and not connecting the Province with any other or others of the Provinces, and no power was attempted to be given to extend beyond, into the United States of America, it was properly the subject of legislation by the Provincial Assembly.

We are now called on to say whether the matters legislated upon by the 33 Vic., cap. 47, are subject to the same legislative control, or are *ultra vires* of the Local Legislature.

It is a clear, and well established rule of construction, that where the words of an Act of Parliament are plain and unambiguous, and without anything in the Act to limit or control them, Courts are bound to construe them in their plain and ordinary sense. In such a case, we can look to nothing but the language of the Act, giving the words of the Statute their ordinary meaning, to carry out what the Legislature in words enacts.

We have cited enough of the Act to shew the subject matter legislated upon, and the general intention of the Legislature relating thereto. The other provisions relate only to the Act not coming into operation without the vote and assent of two-thirds of the rate-payers of the district, and to the means by which the object contemplated is to be effected.

In *The European and North American Railway Company* v. *Thomas*, we shewed that the right to legislate relative, *inter alia*, to railways and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province, belonged, by the express terms of "The British North America Act, 1867," exclusively to the Parliament of Canada. If that be so, how can this Act 33 Vic., c. 47, be valid? The railway, with a view to the construction of which the Act was passed, most unquestionably extends beyond the limits of this Province. It is a connecting line of railway from the Town of Houlton, in the United States of America, to the line of the New Brunswick and Canada Railway and Land Company, (a railway constructed within this Province by virtue of divers Acts of the Provincial Assembly), at or near Debeck

Station, so called, in this Province; for the purpose, as the Act declares, of meeting the desires of the inhabitants of the Town of Saint Stephen in the County of Charlotte, and to enable them to have (as stated in the Act) direct railway communication between Houlton in the State of Maine, in the United States of America, and to St. Croix Valley in the County of Charlotte, in this Province. How then, can any one who reads the Act, escape the conclusion that it directly contravenes the letter and spirit of "The British North America Act, 1867," in this:—that it deals with, and makes provision for, the construction and completion of a railway unquestionably extended beyond the limits of the Province—a subject matter expressly and unequivocally reserved to be dealt with exclusively by the legislative power of the Parliament of Canada.

It is difficult to conceive how, if the Local Legislature had the power, it could more efficaciously legislate on the subject of railways extending beyond the limits of the Province, or secure the existence or completion of such undertakings than by providing the funds necessary for their construction, and that, too, in a case like this, where, from the Act, it would seem that the giving of the Debentures to be issued thereunder was an express condition on which the road was to be built, and without which, the fair inference is, the road could not, or would not, be built.

Many cogent reasons were suggested during the argument, why the Imperial Parliament, not only in the interest of the Dominion with reference to fiscal and trade regulations, but also in the interest of the Dominion and the Empire at large in a strategetic point of view in reference to the protection and defence of this portion of the Empire, confided to the Parliament of Canada and the General Government of the Dominion the exclusive right to legislate on the excepted classes of subjects having reference to matters connected with the establishment of great lines of communication extending out of, and beyond the limits of the respective Provinces. But it is unnecessary for us to speculate on what may have influenced the Parliament, or to discuss the policy of the Act. It is sufficient that the language of the Act is, in our opinion, clear and unambiguous; and in such a case, its provision must be respected and obeyed alike by all.

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We do not disguise from ourselves, that, the Provincial Act having been accepted as binding, and having been acted upon, much disappointment, and very serious inconvenience and loss may, nay, almost necessarily must, result from the effect of our decision. While we regret that this should be the case, we dare not shrink from the discharge of our duty, which in this, as in every other case that comes before us, is plain, simple and imperative, that is, to declare the law as we honestly believe it to be, wholly regardless of consequences.

The Local Legislature, then, having in our opinion, exceeded its authority, the Act in question is null and void; and, as a necessary consequence, any assessment made under it must likewise be of no legal effect, and must therefore be quashed.

FISHER, J. I regret that I cannot concur in the judgment of the other members of the Court in this case, and I express my opinion with great deference to my learned Brethren. If the words "or extending beyond the limits of the Province" in the first paragraph of the 10th clause of section 92 of the "British North America Act, 1867," are to be taken in their literal sense, then, in one view of the question, the 33 Vic., c. 47, is *ultra vires*, as it authorizes the granting of Debentures to aid in building a railway from Houlton, which is in the State of Maine, to the New Brunswick and Canada Railway in this Province, unless a fair construction of the Act may shew a different intention. I have never been able to satisfy my mind that this was the true meaning of these words. Before the union of the Provinces the legislative powers of each Province were confined to the limits of the Province. It was the object of the "British North America Act, 1867," to provide for a Parliament having legislative powers over the whole Dominion which was constituted by the united Provinces, and a Legislature for each Province. The powers of legislation were distributed between these different bodies. Objects of a general or national character, such as trade and commerce, railway and works running over the whole Dominion, were exclusive subjects of legislation by the Parliament of Canada; whilst the power to legislate upon local matters, and the construction of local works, was conferred upon the different Legislatures. Before the Union, the Legislatures of the respective Provinces were as

incompetent to enact a law extending beyond their limits as they now are. The Parliament of Canada has now no power of legislation beyond this Province into the State of Maine. It has authority to pass laws upon various subjects affecting the whole Dominion, and which are in force in every Province. It may incorporate a railway company, or authorize the construction of a railway through the whole Dominion, or a line of telegraph or other such public work. Its legislative power is general, extending over all Canada. The legislative power of each Province is confined to the individual Provinces. It appears to be the object of the exception in the 10th clause of the 92nd section, so to limit the power of the Local Legislatures as to prevent any conflict of the Parliaments in this respect; and, whilst the Parliament of Canada can enact laws affecting each Province, each Local Legislature cannot legislate beyond the Province, and the exception, confining the power of the Local Legislature to other works than those connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province, I think, must necessarily mean works within the Dominion of Canada, because, by extending beyond the limits of the Province into some other of the Provinces, the authority of the Parliament of Canada would be contravened; whilst the extension into the State of Maine would have no such effect, as the Parliament is as powerless to legislate there as the Local Legislature, and there would be no object for such limitation of power.

The next paragraph expressly refers to foreign countries; and if the first paragraph was intended to include a foreign country, it would not have been necessary to make special provision therefor in the case of a line of steamships in the second. By construing the Act in this way, each paragraph of the clause has a distinct meaning, indicating the object of the different paragraphs and provisions; and if this be not the construction, the second paragraph is useless, for, if the words "extending beyond the limits of the Province" in the first paragraph mean a foreign country it includes, not only railways and telegraph lines but lines of steamships, and the latter are the subject of a distinct enactment in the second paragraph which could only have been inserted to provide for a state of things not in the contemplation of the first.

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I cannot reconcile these exceptions with the general object and purpose of the Act by any other construction. As the authority conferred by the 30 Vic. c. 54, incorporating the Houlton Branch Railway Company to build a railway, is confined to a line from the intersection of the Woodstock line with the New Brunswick and Canada Railway to the boundary of the State of Maine. I will not presume that the Saint Stephen contribution of Debentures was appropriated to any other object than is contemplated by the Act of incorporation, especially as the Town of Houlton is by the Statute 33 Vic. c. 47, stated to have contributed towards the construction of this road. The Legislature was clearly authorized, in my view of the law, to enable the people of Saint Stephen to contribute towards the construction of that portion of the line within the Province, and the most reasonable presumption is that they did so. If there was anything in the Act 30 Vic. c. 54, which would come within the exclusive powers of the Parliament, it is saved by the 129th section of the "British North America Act, 1867." and never having been repealed, altered or amended in any way, is still in force. It also appears to me that the Act 33 Vic., c. 47, comes within the category of powers provided for in the 16th clause of the 92nd section of the "British North America Act, 1867," being purely a matter of a local nature. It is difficult to discover any provision, in the exclusive powers of the Parliament, that may be fairly construed to meet this case ; and it cannot be contended that the British North America Act is so construed as to prevent localities from granting aid to attain some local object, or receive some advantage purely local. The fair construction in this respect appears to be that the authority conferred upon the Parliament to raise money by any mode or system of taxation was for the purposes of the General Government or of the whole Dominion, to enable the Parliament and Government to discharge the duties and obligations cast upon the Dominion, and that taxation for local purposes is confined to the Legislatures of each Province. Nothing can be more local than the Act 33 Vic., c. 47, for its enactment is made contingent upon a favorable vote of the rate-payers of the locality desiring the railway. The whole subject is as local as can well be conceived. There is the small locality, comprising the most thickly populated portion of the

Parish of Saint Stephen, connected with the New Brunswick and Canada Railway, which terminated at Woodstock in the County of Carleton, who desire the connection with Houlton, a small Town in the State of Maine, which has no railway connection with any other place. Each of these localities agreed to give a subsidy to build the line to the boundary of the Province, the Town of Houlton giving $30,000 for the portion lying within Maine, and the Saint Stephen district giving $15,000 toward the construction of the line within this Province to the boundary. The reason of the inequality of the subsidy for nearly the same distance of railway is explained by referring to the 6th section of the 30 Vic. c. 6, intituled "An Act to facilitate the construction of certain railways," which grants a subsidy from the Province of $5000 per mile for the construction of the road therein styled a branch line from the railway leading from St. Andrews to Woodstock, and which is designated the New Brunswick and Canada Railway. If there could be any doubt upon this point, and it is material, the Act to facilitate the construction of railways clearly shows for what purpose this aid within the Province was granted, and that they were to secure the construction of that part of the road leading to Houlton, which was within the Province. I have not adverted to the 13th clause of the 92nd section of the British North America Act, 1867, which gives to the Local Legislatures exclusive power to legislate upon property and civil rights, which must comprehend a case of the kind under consideration, because it does not appear to me to be of the class of cases referred to in the 10th clause of the 92nd section of the British North America Act, and it does appear to me to come under the general authority to tax for local purposes, the Local Legislature having granted aid to objects of a local nature. For this reason, I am of opinion the rule should be discharged.

Rule absolute to quash the assessment.

1873. EX PARTE MAHER AND OTHERS.

February. *Assessment—Party objecting to—Onus of proof—Assessment for interest on Debentures "to be issued"—Legality of.*

A Town Council authorized by Law to assess for "interest" payable on Debentures "issued" by the Board of School Trustees, has no power to make an assessment for interest on Debentures "to be issued."

A party objecting to an assessment is bound to show *prima facie* that it is wrong.

A rule *nisi* having been obtained on the application of Henry Maher and others, for a *certiorari* to remove the assessment on the Town of Portland—

King, A. G., Fraser, and Dr. *Barker* shewed cause in last Michaelmas Term.

Duff, Q. C., and *C. W. Weldon* were heard in support of the rule.

As the ojections taken to the assessment, on which the judgment of the Court is based, are there stated, it is unnecessary to refer to them here.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

ALLEN, J. A number of objections were taken to the general assessment of the Town of Portland, which we think were answered by the affidavits produced on shewing cause. As to the assessment for the Public Hospital, under the Act 23 Vic., c. 61, we quite agree with Mr. *Weldon* that the materials before the Court are not sufficient to enable us to form any opinion whether the amount assessed is right or wrong; and it is the duty of a party objecting to an assessment to shew *prima facie* that it is wrong. The objections to the general assessment therefore fail. There is one objection to the school assessment, which, as at present advised, appears to us to be fatal. In the estimate of the amount of $17,000 required for the maintenance, &c., of schools, sent in by the Board of Trustees to the Town Council on the 22nd April last, is included several sums for interest on Debentures "to be issued" for repairs, and for land and buildings.

By the 58th section of "The Common Schools Act, 1871," subsections 5 and 6, the Board of Trustees is authorized to borrow money for the purchase of lands, and for the erection and repair

of buildings. By sub-section 7, to enable the Board to borrow money, it may issue Debentures in such form and for such sums as may be decided on, redeemable in twenty-five years, with interest payable half-yearly. By sub-section 9 the Board of Trustees is directed to notify the Council of the sums required for the yearly support of the schools, and other matters, including "the interest payable on Debentures issued by the Board."

Until the Debentures are issued, and a debt created, how can an assessment be made for interest? We are asked to read the word "issued," as if the Legislature had said "to be issued." But what right have we to depart from the plain language of the Act and give a construction to the words used, entirely at variance with their natural meaning, and also, as we think, opposed to common sense, for it cannot be supposed that the Legislature ever intended to vest a power in the Trustees to ask an assessment to raise interest on Debentures *in prospectu*, and which, perhaps, might never be issued. When the Trustees have borrowed money under the authority given in the Act, and contracted a debt, then, and then only, can they ask for an assessment to pay the interest. If, from any cause, the intended Debentures should never be issued, what is to become of the money which has been assessed and levied to pay the interest upon them? The Trustees may have fully intended to issue the Debentures when they sent in the requisition, but the Act gives no authority to assess for interest in such a case. The power given by the Act must be strictly followed, and no tax can be levied for any purpose not authorized by the Legislature.

In *Richter* v. *Hughes*[1] trustees were authorized to borrow a sum of money on interest, and to assess to pay the interest and certain salaries mentioned. They borrowed a larger sum than the Act allowed, and it was held that a rate, made to pay the interest on the whole sum borrowed, was bad. The language of HOLROYD, J., in that case, is very applicable here. He says: "The money to be raised was to be applied to the payment of money already actually borrowed, or then actually due, and therefore could not be for payment of salaries afterwards to become due,

[1] 2 B. & C. 499.

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Ex parte MAHER.

and not due at the time of making the rate." So here, the money to be raised was to be applied to the payment of the interest of money actually borrowed, or to Debentures actually issued. We think there is nothing in the objection that the Town Council did not sanction the issue of Debentures to the amount of $17,000. They sanctioned it most effectually when they ordered assessment for it.

Rule absolute for certiorari.

CASES DETERMINED

BY THE

SUPREME COURT OF NEW BRUNSWICK

IN

EASTER TERM, XXXVI VICTORIA.

REGINA *v.* HARSHMAN ET AL; EX PARTE WELDON.

1873.

April.

Justice of the Peace—Adjudging commitment—Application of form —Certainty—Costs.

A conviction under the Act 33 Vic., c. 23, for selling liquor without license is bad, if in addition to the costs of prosecution allowed by the Act, the Justices adjudge the defendant, in default of payment, to be committed to gaol for a certain time unless the penalty and costs, *together with the costs of commitment and conveying him to gaol*, be sooner paid.

The form of conviction (L) in 1 Rev. Stat., c. 138, specifying the costs of commitment and conveying the defendant to gaol is not applicable to all cases, but only where the Act, under which the penalty is imposed, authorizes the Justices to award such costs.

A conviction for selling liquor without license stated the sale to have been contrary to two Acts of Assembly, (stating the titles of the Acts):—*Held*, That it was sufficiently certain, and that the conviction was substantially good under both Acts, the first, (17 Vic., c. 15), making the sale of liquors without license illegal, and the second, (33 Vic. c. 23), imposing the penalty for such sale.

William J. Weldon, was convicted before the defendants, two Justices of the Peace for the County of Westmorland, on the 1st February, 1872, for selling spirituous liquors without license to Jesse Betts, and was adjudged to pay a fine of $40, and $9.55 costs of prosecution, and in default of payment to be imprisoned for fifty days, unless the said sums, and the costs and charges of the commitment and conveying the said William J. Weldon to gaol be sooner paid. A rule *nisi*, to quash the conviction, was

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obtained on the following (among other) grounds: 1st, That the Act 33 Vic. c. 23. was *ultra vires*, because the second section declared that no license should be granted in any Parish, where two-thirds of the resident rate-payers therein petitioned the Sessions against granting any licenses; and because the fifth section altered the rules of evidence and cast upon the party charged the burthen of proving his innocence in certain cases: both of which, it was contended, were beyond the powers of the Local Legislature, under "The British North America Act, 1867," §§ 91 and 92. 2nd, That the conviction was uncertain and bad, because it professed to have been for selling liquor contrary to two Acts of Assembly—the 17 Vic. c. 15, and the 33 Vic. c. 23. 3rd. That the conviction was bad in adjudging the costs of commitment and conveying the party to gaol.

Feb. 13 and 14. *W. J. Gilbert* and *Morrison* shewed cause, citing *Paley Conv.* 168, 169, 298; *King* v *Hall.*[1]

A. L. Palmer, Q. C., and *Hickman* shewed cause.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, J. As to the first objection. No question arises here either under the 2nd or 5th sections of the Act 33 Vic. c. 23; and therefore, even though those sections may deal with matters over which the Local Legislature has no control, (on which we express no opinion), that would not invalidate the 3rd section of the Act, the subject matter of which is, no doubt, within the jurisdiction of the Local Legislature by the 9th and 15th sub-sections of "British North America Act, 1867," sec. 92.

We do not think the second objection is sustainable. The conviction could only properly be made under both Acts. The Act 17 Vic., c. 15, sec. 2, declares that "No person shall directly or indirectly barter or sell any liquors, without license for that purpose first obtained, as hereinafter provided." Subsequent sections provided by whom, and to whom, and on what conditions licenses should be granted; and the 11th section imposed a penalty for selling without license, and directed the mode of recovery. This

[1] 1 T. R. 322.

section is repealed by the 33 Vic., c. 23, sec. 3, which imposes different and higher penalties for selling without license, and directs the recovery to be had before two Justices of the Peace, instead of one, as under the repealed section of the 17 Vic., c. 15; and though it is this latter Act only which declares the sale of liquor without license to be illegal, the penalty is imposed by the 33 Vic., c. 23; and therefore we see no substantial objection to the conviction stating the sale to be contrary to both Acts—the latter being a continuation and amendment of the former, and the offence being specified with certainty.

The third objection we think is fatal. The Act 33 Vic., c. 23, sec. 3, declares, that any person selling liquor without license, shall, for the first offence, forfeit a sum not exceeding $40, nor less than $10, to be recovered "with costs of prosecution," before any two Justices of the Peace in the County where the offence is committed, and in default of payment, the offender shall be committed to the common gaol for a term not exceeding fifty days, nor less than thirty days. The conviction in this case follows, substantially, the form (L) in 1 Rev. Stat., cap. 138, "Of Summary Convictions," which mentions the costs of the commitment, and conveying the party to gaol; but that part of the form can only apply to cases where the Justices are expressly authorized to allow those costs. Thus we see the 13th section of that chapter provides, that "where no form of conviction is given, the Justice shall draw up one according to the forms (L.M.) *applicable to such case*, or to the like effect," clearly shewing that these forms were not to be followed indiscriminately; but that regard was to be had to the particular provisions of the Act under which the conviction was had, and that only such costs could be awarded as the Act authorized. By this Act (33 Vic. c. 23) the only costs mentioned are the costs of prosecution; nothing is said of the costs of commitment and conveying the party to gaol. The Act of Parliament, 11 and 12 Vic., c. 43, sec. 21-23, gives express power to award such costs; and by the Act of Assembly 12 Vic. c. 31, section 20-22, (which was substantially copied from the English Act), a similar power is given; and by referring to the forms of conviction (M.) and (N.) in that Act, it will be found that the words adjudging the payment of the costs of commitment and conveying

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to gaol are placed within brackets, evidently for the purpose of shewing that they were not necessarily a part of every conviction, but were only to be used where the Act, under which the conviction was made, authorized the Justices to impose such costs: just as the words "*to be kept to hard labor,*" also within brackets, were only to be used where the Justices had power to impose that punishment. In other words, these general forms of conviction were to be made applicable to the particular case on which the Justices were then adjudicating, and to the provisions of the Statute under which they were proceeding. In revising the Statutes, the power which was given to Justices by the Act 12 Vic., c. 31, to award the costs of commitment and conveying the party to gaol, has been omitted from the Summary Convictions Act, (1 Rev. Stat., c. 138), though the words have been retained in the forms of conviction, (L.) and (M.), but, unfortunately, without the distinguishing brackets, which are shewn in the corresponding forms in the Act 12 Vic., c. 31; and, no doubt, this omission was calculated to mislead the Justices in the present case. The objection to the conviction is not merely technical. If such costs are awarded, the Justices, in effect, impose upon the party convicted a larger penalty than the Statute allows.

The case of *Clifford* (*ex parte*),[1] entirely supports the view we take of the illegality of the conviction in respect to the costs of commitment; the rule to grant the conviction must therefore be made absolute.

Rule absolute to quash conviction.

[1] 3 Allen 16.

DOE DEM. EDGETT v. DOWNEY.

1873.
April.

New trial—Ejectment—Verdict for defendant.

As a general rule a new trial will not be granted in ejectment when the verdict is for the defendant.

This case was tried at the Albert Circuit before FISHER, J., when a verdict was found for the defendant. In Michælmas term, 1872, *Hickman* obtained a rule *nisi* for a new trial, against which, on

April 14, *D. L. Hanington* shewed cause.

Hickman, in support of the rule.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

ALLEN, J. We do not think that there is enough in this case, to take it out of the general rule that a new trial will not be granted in ejectment, where the verdict is for the defendant, as the plaintiff may bring another action, and obtain all the benefit that he would obtain by a new trial.

Whatever doubt there may be about the effect of Hayward's deed to Ward—Hayward not appearing to have been in possession of the land at the time, though he had been in possession, and cleared part of the land, and built a house upon it—there is clear evidence of acts of possession by Ward, under the deed, and of his having had the lines run out by Stiles, and afterwards forbidding Bishop from cutting timber on the land without the permission of Martin, who appeared to have occupied the land by permission of Ward. We think, therefore, there was sufficient evidence to warrant the jury in finding for the defendant.

Rule discharged.

EX PARTE ROBINSON AND OTHERS.

1873.
April.

Parish officers—Election—Confirmation of election by Sessions—Mandamus.

Where a list of the Parish Officers elected at the Parish meeting has been properly certified by the Chairman and attested by the Clerk, the Sessions are bound to confirm the election unless some irregularity is shewn in the election.

In last Hilary term, *S. R. Thomson, Q.C.,* shewed cause against a rule *nisi* for a mandamus to the General Sessions of the Peace for the City

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Ex parte ROBINSON.

and County of Saint John, to compel them to confirm the list of Parish officers elected by the ratepayers of the Parish of Lancaster in March, 1872. It appeared by the affidavits of John Shives, the Chairman, and John Robinson, the Poll Clerk, read on obtaining the rule, that a correct list of officers so elected, duly certified by the Chairman and attested by the Clerk, was forwarded to the Clerk of the Peace on the 18th day of March, 1872, pursuant to the Act 28 Vic., c. 37, intituled "An Act for the alteration and amendment of the local government of the Parishes of Simonds, Lancaster and Saint Martin's, in the City and County of Saint John," the 8th and 9th sections of which read thus:—(8th). "On or before the Saturday next following the said election, a correctlist of the officers so elected, certified by the Chairman, and attested by the Clerk, shall be forwarded by the Chairman to the Clerk of the Peace aforesaid to be laid before its next Sessions at its opening." (9th). "The persons so elected and certified shall be confirmed in their offices by the Sessions for one year; and should there be no election of officers, or not a sufficient number chosen, whether limited by this Act or otherwise, or no certified list laid before the court, the Sessions shall make the necessary appointments." The Sessions, on the 19th day of March, being their next meeting, did not confirm the list of officers so elected for the said parish and certified to them by the chairman and clerk, but made a new list of officers for the parish for the year 1872. It was now contended, 1st., That it was incumbent on the applicants to show that the proceedings preliminary to the alleged election was properly taken, as that proper notices were given, etc., which they had not done. 2d. That the remedy cannot be by mandamus, but must be by *quo warranto*. 3. The Sessions having determined the matter, this court will not enquire into the propriety of their decision on a question of face. *Darley* v. *Regina*;[1] *Regina* v. *Guardians of the Poor of St. Martins' in the Fields*;[2] *Cameron* (*Ex parte*;)[3] and *Frost* v. *Chester*[4] (Mayor, etc.), were cited.

A. L. Palmer, Q.C., in support of the rule.

We have no right to proceed by *quo warranto*, because we are not in the office until the election is confirmed by the Sessions, therefore a mandamus is our only remedy. The Sessions have, in an arbitrary manner, refused to confirm the election, without having any legal reasons for

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[1] 12 Cl. & F. 520. [2] 17 Q. B. 149. [3] 1 Han. 306. [4] 5 E. & B. 531.

so doing. The certificate of the chairman and affidavit of the clerk to the list are surely *prima facie* evidence of its correctness.

1873.

Ex parte ROBINSON.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

WELDON, J. The ninth section of the Act gives power to the Sessions only to make the necessary appointments when there should be no election of officers or not a sufficient number chosen, whether limited by the said Act or otherwise, or no certified list laid before the court. It does not appear by the affidavits produced to this court that there was any irregularity in the election of the officers, or that the list was imperfect by having omitted to select a sufficient number, or in the manner it was certified; and therefore we cannot see the contingency ever arose upon which the Sessions had the right to appoint. The duty of the Sessions appears to be plain, and the duly certified list ought to have been confirmed.

As the appointment of the officers was only for the year—and a new set of officers appointed, whose terms of office have expired—the making of the rule absolute for a mandamus, would be productive of no good, even if we were of opinion it was the appropriate remedy; but upon this point we offer no opinion. The affidavits on the part of the Sessions do not show any just reason or cause for the course they adopted.

The year for which the officers were elected, and those who were appointed by the Sessions, having passed away, renders it nnecessary to make any order in the matter. The rule will therefore be discharged.

Rule discharged.

TOWER *v.* COX.

1873.

April.

Demurrer—Conclusion—Sufficiency of.

A demurrer is sufficient in form though it does not conclude with a prayer of judgment.

A motion was made on a former day of this term to set aside a demurrer to the declaration in this cause on the ground that it did not conclude

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with a prayer of judgment. The plaintiff's counsel, on the argument of the demurrer, also applied for leave to amend the declaration by adding two counts.

D. S. Kerr, Q.C., and *C. Milner* for the plaintiff.

Dr. *Barker* for the defendant.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C.J. Default or omission of an avernment in the conclusion of a plea is but form and does not prejudice on general demurrer: *Com. Dig.* (E. 33), *Pleader*, and cases cited; and a demurrer is sufficient if it has the substance of a demurrer though it is not formal, and though it does not conclude with an averment, *et hoc*, etc.: *Com. Dig.* (Q. 3). In this case the demurrer tenders all that is necessary to raise an issue of law. On the decision of that issue the law awards judgment, as a necessary consequence, whether there is a prayer for judgment in the demurrer delivered or not; and when the roll is made up, the mere formal entries are put on the record. We think, therefore, there is no ground for setting aside this demurrer. We think the plaintiff should have leave to amend his declaration by adding two counts in the case, such as have been submitted. If the defendant, after the intimation thrown out on the argument, still thinks those counts defective, he can raise the point by demurrer, or in arrest of judgment, and the question can be formally decided on the record. But this amendment can, of course, only be allowed on payment of costs.

Judgment accordingly.

1873.
April.

HERBERT, PETITIONER, *v.* HANINGTON, RESPONDENT.

Costs—Taxation of—Election law—Allegations—Materiality of witnesses to prove—Notices—Publication.

Where on the trial of an Election Petition, the judge disallowed the costs of certain allegations in the petition, the affidavit of the attendance of witnesses used in taxing costs should show that the witnesses were material to prove those allegations in the petition on which costs were allowed.

Publication of notice in a newspaper "for three consecutive days," under the 69th section of the Act 32 Vic., c. 32, cannot be made in a weekly newspaper. The petitioner is not entitled to the costs of publishing notices in a newspaper, and of posting.

In this case, which was an Election Petition under "The Bribery and Corruption and Election Petition Act, 1869," there was an application

by the respondent for a review of the taxation of costs, on the ground that certain items, of $47.50 for witness fees, $39.00 paid the Chignecto *Post*, and $14.00 sheriff's charges for posting, in other places than on the Court House and in the registry office, were improperly allowed.

The learned Judge who heard the cause made an order for the taxation of the appellants' "costs, charges and expenses of and incidental to the presentation of the above Petition in this cause, under 'The Bribery and Corruption and Election Petition Act, 1869,' and to the proceedings consequent thereon, including such counsel fees, witness fees, and such other costs as are provided by the said Act, with the exception of the charge of treating Hugh McMonagle, in the fourth paragraph of the Petition; the charge of treating Joseph Pourier, in the tenth paragraph of said Petition; the charge of offering money to John Fawcett to induce him to resign, and the particulars of the names of persons bribed or treated delivered to the said respondent, shall be taxed under the provisions of the said Act."

The affidavit of the petitioner stated, "that he was informed by his attorney and counsel, in the above Petition, that the said witnesses were necessary and material witnesses for this deponent on the trial of the said Election Petition; and this deponent lastly saith that he, this deponent, verily believes the said witnesses mentioned in the statement hereto annexed as aforesaid were all necessary and material witnesses for and on behalf of this deponent on the trial of the said Election Petition aforesaid."

A. L. Palmer, Q.C., argued the case for the respondent, and *Morrison* for the petitioner.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

WELDON, J. It is perfectly consistent with the affidavit of the petitioner that the witnesses, whose fees were objected to, attended to prove that portion of the Petition disallowed by the order of the Judge. The affidavit should have stated what portion of the petition they were subpœnaed to prove, or, if examined, to shew that their testimony was applicable to that portion of the Petition retained by the learned Judge. As in *Holderness* v. *McKendrick* [1] the rule is laid laid down that witnesses

[1] 2 Allen, 213.

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whose expenses are claimed were necessary to support the charges alleged against the respondent. The charge of $47.50 for witnesses' fees cannot be sustained. As to the charges of publishing in the Chignecto *Post*—3 weeks, $39.00—and the sheriff's charges for posting—$14.00—the Act of 1869, sec. 69, provides that "Publication of any paper or notice shall, when it is not otherwise expressed, be by posting printed copies of such paper or notice on the Court House, in the Registry Office of the county to which the Petition relates, or by publishing the same for three consecutive days in a paper published in the county." The Petition in this case was published in a weekly paper three times. This is not in the terms of the Act, and the charge made therefor is not allowable. The charge of $47.50 for witnesses, $39 for Chignecto *Post*, and the sheriff's charges, $14, were improperly allowed, and the rule must, therefore, be made absolute for referring the costs back to the Clerk of the Pleas to make the above corrections.

Judgment accordingly.

1873.
April.

ALLINGHAM *v.* O'MAHONEY.

Contract—Sale—Vesting of property—Sufficient delivery.

Defendant agreed to purchase from plaintiff for $800 the machinery of a mill, which was partly covered with sand, and paid him earnest money to bind the bargain. About ten days afterwards the plaintiff signed a writing by which he guaranteed that certain of the machinery (specified) was under the surface of the ground where the mill had stood, and agreed to deliver all the machinery belonging to the mill for $800, and acknowledged the receipt of $10 on account of sale. He afterwards made a formal delivery of part of the machinery in the name of the whole, but the defendant refused to take it unless it was put on the surface of the ground. Held, That the title to the machinery vested in the defendant by the verbal agreement when the earnest money was paid, no act remaining to be done by the plaintiff; but that if by the writing any delivery was necessary, the plaintiff had made a sufficient delivery, and was not bound to put the machinery on the surface of the ground.

The plaintiff was the owner of a steam saw-mill at St. Martin's, in the County of St. John, which was destroyed by fire. The machinery fell in the tide and became covered with sand, with the exception of some lighter stuff which was placed in a warehouse. The defendant being desirous of purchasing the machinery, the sum of $800 was agreed on as the price of all the machinery that had been in the mill at the time of the fire, and $10 were paid to bind the bargain. This took place about the 5th May.

About ten days afterwards the plaintiff signed a writing as follows:— "I, the undersigned, do hereby guarantee that there is under the surface of the ground, at the site of the mill formerly owned by Allingham & Turtelott, (*here followed a description of certain pieces of machinery*) and I hereby agree to deliver all the machinery belonging to the said mill for the sum of $800, and acknowledge the receipt of $10 on account of the sale." The plaintiff afterwards made a formal delivery of part of the machinery in the name of the whole, but the defendant refused to take it unless it was put on the surface of the ground. The present action was then brought for the balance of the $800, as for goods bargained and sold. At the trial before WELDON, J., at St. John, the learned Judge left to the jury to find what the contract was between the parties—whether it was complete on payment of the earnest money. Verdict for plaintiff.

A rule *nisi* for a new trial having been obtained, on

Feb. 5, *Haliburton Weldon* shewed cause. As all the machinery that had been in the mill was to pass, it became a specific article, the contract of sale of which was perfect and complete on the payment of the earnest money. The property then passed, and that contract was never rescinded. Delivery was not necessary to pass the property: *Dixon* v. *Yates*.[1]

W. Jack, Q.C., in support of the rule.

The verbal contract did not pass the property, as the sale was not complete until it was in a position to be sold: *Pars. Con.* 525. The whole contract arose out of the written agreement, which required actual delivery to be made, which could not be while the property was under the sand. *Isherwood* v. *Whitmore*[2] was cited.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C.J. There was a complete contract for the sale of the machinery, when the defendant, about the 5th May, made the verbal agreement to purchase for $800, and paid the plaintiff $10 to bind the bargain. The defendant knew at the time he made this bargain that part of the machinery was covered with sand; there was no concealment or misrepre-

[1] 5 B. & Ad. 340.

[2] 11 M. & W. 347.

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sentation by the plaintiff, and nothing remained to be done by him to vest the property in the defendant; and therefore it became his absolute property on the payment of the earnest money. It is contended, however, that the subsequent writing, dated the 18th May, was the agreement between the parties. This writing, signed by the plaintiff, is as follows:—

"I, the undersigned, do hereby guarantee that there is under the surface of the ground, at the site of the mill formerly owned by Allingham & Turtelott, (*here follows a description of certain pieces of machinery*), and I hereby agree to deliver all the machinery belonging to the said mill, for the sum of $800, and acknowledge the receipt of $10 on account of the sale."

If this is to be treated as the agreement of sale, what becomes of the first one? If the property vested in the defendant by the first agreement (as it clearly did), it must have been re-vested in the plaintiff between the time of making that agreement, and the 18th May, when he signed the writing, if that is to be taken as the agreement to sell; but it is not pretended that anything of that kind took place.

Admitting that the plaintiff (having already parted with the property) could, and did, without any new consideration, bind himself by this writing to deliver the machinery to the defendant, we think he did all that was necessary to constitute a delivery, when he went to the place where the machinery was, and there delivered one piece of it to the defendant in the name of the whole. He did not agree to deliver it on the surface of the ground: his guarantee that it was there, under the surface, shews that; for if he was to deliver the whole of it above ground, where was the necessity of his guarantee? Perhaps it may be, that if the machinery which he mentions in the writing, is not under the ground, he will be liable on his guarantee; but no such question arises here.

Rule discharged.

1873.
April.

LAWTON *v.* REED *et al.*

Easement—Demise—Construction of—Wharf.

Plaintiff leased to defendant part of a wharf forty feet wide by one hundred feet in length; "together with a right of way or passage for foot passengers, horses, carts, etc., in, through, over, and upon the wharf to the southward, westward, and northward" of the part leased (the eastern part fronting on a highway). *Habendum*, the demised premises, "together with the privilege and enjoyment of the said wharf, and the said right of way or passage hereby demised," etc. The plaintiff covenanted to keep the wharf in good repair and fit for the transportation of goods and merchandize, and for the passage of horses, etc., so that it may be used by the lessee, his executors, etc., "for all purposes of ingress, egress, etc., and as a highway," etc. Held, That the demise only extended to the portion of the wharf forty feet by one hundred feet, and the lessee had only a right of way over the remainder of the wharf, and was liable to pay wharfage for landing goods upon it.

This was an action to recover wharfage, and the plaintiff's right depended upon the construction of a lease made by him to the defendant, dated the 15th December, 1855, by which he demised and leased to the defendants, their executors, etc., "All that certain portion of the wharf and premises known as Lawton's wharf, situated, etc., beginning at a point on the west side line of Water street, distant 20 feet northwardly from a prolongation westwardly of the north side line of Duke street, and running thence northwardly along the west side line of Water street 40 feet; thence at right angles westwardly 100 feet; thence at right angles southwardly 40 feet; and thence eastwardly 100 feet to the place of beginning; together with all buildings, etc.; together also with a right of way or passage for foot passengers, horses, carts, waggons and vehicles of every description, in, through, over and upon the wharf to the southward, westward and northward of the hereby demised premises, and all extensions and additions thereto; together also with a right of way or passage of at least six feet in width, for the conveyance and convenience of goods and passengers, in, through, over and along that portion of the building now erected on the hereinbefore described premises, and which extend beyond the said premises, a distance of not less than ten, or more than twelve feet to the westward thereof, such right to be held, used and enjoyed in common with the parties hereto of the first part. To Have and To Hold the said hereinbefore demised premises, together with the privileges and enjoyments of the said wharf, and the said right of way or passage hereby also demised unto the said James Reed, etc."

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LAWTON v. REED.

There was a covenant by the lessor not to build, or place any obstructions upon the wharf or thoroughfare to the northward, southward or westward of the demised premises, and also to keep the wharf to the northward, southward and westward of the demised premises, and every extension of and addition to the wharf, "in thorough good order and repair, and fit and proper for the transportation of goods and merchandise, and for the passage of horses, carts and vehicles of every description, so that the same may be used by the said James Reed and Robert Reed, their executors, etc., for all purposes of ingress, egress and regress, and as a highway either for foot passengers or with horses, carts, etc."

At the trial at St. John, before ALLEN, J., a verdict was entered for the plaintiff, leave being at the same time reserved to the defendant to move to have a non-suit entered, or the verdict altered to one for the defendant.

Pursuant to such leave, *A. L. Palmer, Q.C.*, in Michaelmas Term, 1872, obtained a rule *nisi* on the ground (among others) that under the words in the habendum, "together with the privilege and enjoyment of the said wharf," the right to use the wharf for the purpose of placing goods thereon discharged from vessels passed to the lessees, and that, therefore, they were not liable to pay wharfage therefor to the plaintiff.

Feb. 18, 1873. *W. Jack, Q.C.*, shewed cause.

A. L. Palmer, Q.C., in support of the rule.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C.J. It is contended, that under the words in the habendum, "together with the privilege and enjoyment of the said wharf," the right to use the wharf for the purpose of placing goods thereon discharged from vessels passed to the lessees; but we think that, taking the whole of the terms of the lease, all that was demised to the defendants was that portion of the wharf upon which they have built their warehouse, measuring 40 feet by 100 feet, and whatever else was granted to them was merely an easement, or right of way, to give them ingress and egress to and from the different parts of their warehouse to which they had not access from Water street, but gave them no right to use the wharf in any other way, or to claim exemption from wharfage, which all other per-

sons would be liable to pay under the 18 Vic., c. 41. We think the plaintiff's covenant to keep the wharf in repair, so that it may be used by the lessees for the purpose of ingress, egress, etc., "as a highway," clearly shews that there was no intention to demise the whole wharf or to give the lessees anything more than an easement beyond that portion which is covered by the warehouse, and consequently, that the plaintiff would be entitled to recover wharfage under the Act.

This disposes of the substantial question in the case. On the other grounds;—we think there was evidence both of the plaintiff being the owner of the wharf; that it was properly planked according to the directions of the Act 18 Vic., c. 41; and that the defendants were the owners or persons in charge of the vessel from which the goods were discharged upon the wharf.

The rule for entering a non-suit will be discharged.

Rule discharged.

1873
April.

KAY, PETITIONER, v. HANINGTON, RESPONDENT.

Election Law—Costs—Attachment.

Where the Judge who tries an election petition makes an order for costs under the 62nd sec. of the Act 32 Vic., c. 32, an attachment for non-payment of the costs should be granted by the Judge and not by the Court.

On a former day of this term, *D. L. Hanington* moved for an attachment for non-payment of costs taxed the respondent, in pursuance of an order made by the Judge, who tried the petition in this case, under the 62nd section of the Act 32 Vic., c. 32. The Court said they would take time to consider, and on a subsequent day in the term judgment was delivered by

ALLEN, J. The jurisdiction of the Court in cases of Election Petitions is altogether statutory, and it has no authority except what is expressly given by the Act 32 Vic., c. 32.

Under the 23rd section of the Act, a case may be heard and determined by the Court: in that case the costs would be taxed under the order of the Court, and an attachment for non-payment of the costs would be granted by the Court under section 62; but where the case is

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heard and determined by a Judge, and he makes the order for costs, we think the attachment must be ordered by him, and not by the Court.

This case having been heard by a Judge, and the costs having been taxed under his order, the Court has no authority to grant an attachment

Application refused.

1873.
April.

HANINGTON *v.* HARSHMAN.

Equity—Appeal in—Costs—Scale of.

On an appeal from the decision of a Judge in equity, the costs of appeal are to be taxed according to the Scale of Costs in equity.

This was an application to review the costs taxed the plaintiff on appeal from the decision of a Judge in equity in this case, the ground of the application being that the costs of the appeal should have been taxed by the scale of costs at common law, instead of those in equity, as had been allowed by the clerk.

W. J. Gilbert argued in support of the motion.

D. L. Hanington, contra.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

WELDON, J. This was an application to review the costs taxed the plaintiff on appeal, on the ground that an appeal from a Judge in equity to the Supreme Court ceases to be a proceeding in equity, and common law costs only are taxable, although the appeal is to this Court as the appellate Court in equity. We see no reason for departing from the uniform practice established for the taxation of costs when the Act 17 Vic., c. 18, entitled, "An Act relating to the administration of justice in equity," came into operation, and has since been acted upon for a period of twenty years. The appeal has to be decided on the principle of equity, and not common law, and the judgment of the Court carried out in accordance with the practice and proceedings in equity, and the equity costs would seem more applicable thereto than the common law costs.

Motion refused.

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April.

Ex parte MOORE.

Portland (Town of)—Civil Court—Review—Where sum claimed is over $20.

The proceeding by review according to 1 Rev. Stat. c. 137, does not apply to a judgment in the Civil Court of the Town of Portland, under the Act 34 Vic., c. 14, sec. 99, where the amount is over $20. See Linton (Ex parte[1]).

The question in this case was, whether the proceeding by review under the Act relating to proceedings before Justices of the Peace in civil suits (1 Rev. Stat., c. 137) is applicable to cases tried in the Civil Court of the Town of Portland, under the Act 34 Vic., c. 11, sec. 99, where the amount is over $20. The case came before the Court on an application for a *certiorari* to remove a judgment on review given by the Judge of the Saint John County Court. A rule *nisi* having been obtained, on

Feb. 17, *E. L. Wetmore* shewed cause.

Morrison, in support of the rule.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C. J. The question in this case is, whether the proceeding by review, under the Act relating to proceedings before Justices of the Peace in civil suits, (1 Rev. Stat., c. 137), is applicable to cases tried in the Civil Court of the Town of Portland, under the Act 34 Vic., c. 11, sec. 99. That section declares that "all proceedings in the said Court for trial of civil causes shall be had in every respect, except as herein specially provided, under the provisions of the Revised Statutes, chapter 137, Title XXXVII."

It is clearly settled that an appeal can only be given by express words, or, at all events, by clear implication: *Rex.* v. *Hanson*;[2] *Reg.* v. *Stock*;[3] *Reg* v. *Recorder of Ipswich*;[4] 2 *Chit. Gen. Pr.* 215.

It is the proceedings *in* the Court held before the Police Magistrate that are to be regulated by the Justices' Act. The review is not a proceeding in the Portland Civil Court, but a proceeding after the trial in that Court has terminated, and before an entirely different tribunal; it is therefore clearly not within the words of the Act, either expressly or by implication; and consequently, the remedy must be by *certiorari*.

Rule absolute for certiorari.

[1] 2 Pugsley 412. [2] 4 B. & Ald. 521. [3] 8 A. & E. 408. [4] 8 Dowl. 103.

1873.
April.

JONES *v.* BIJEAU.

Insolvent Act of 1869—*Sections* 92 *and* 93—*Quasi penal*—*Fraud*—*Offer to suffer judgment*—*Effect.*

The 92nd and 93d sections of "The Insolvent Act of 1869" being *quasi* penal are to be strictly construed, and to warrant imprisonment under their provisions the case must be brought within the express words of the Act.

In an action on a promissory note made by defendant in favor of plaintiff, the declaration alleged fraud and false pretences in obtaining credit according to the 92nd section of the Act: defendant pleaded general issue and gave notice of defence, denying alleged fraud; he also filed offer to suffer judgment by default for amount of the note, which offer plaintiff accepted.

Held, That this was not such a judgment by default as was contemplated by the 93d section of the Act; the acceptance of defendant's offer having settled all the issues in the suit, and therefore no order for imprisonment could be made.

In this case an application was made to the Court for an order for the imprisonment of the defendant under sections 92 and 93 of the Insolvent Act of 1869. The affidavit of Philip Palmer set forth, "that the action was brought to recover the amount of a promissory note, due from the defendant to plaintiff, for $1,254.30; alleging fraud and false pretences in pursuance of section 92 of the Insolvent Act of 1869;" that annexed thereto was a copy of the declaration, "that a copy of the general issue and notices of defence herein was served on or about the 22nd day of February," a copy of which was thereto annexed; "that with the said notices and plea a notice was served of an offer and consent to suffer a judgment herein by default for the sum of $1,425, as damages in pursuance of the provisions of the Act of Assembly, made and provided in the 18th year of the reign of Her present Majesty, intituled 'An Act concerning tender in actions at law and suits in equity;' that the said offer has been accepted by the said plaintiff in accordance with the provisions of the said Act." The action was brought after defendant had made an assignment under the Insolvent Act.

The averment in the declaration was as follows: "That the said promissory note was given by defendant to plaintiff for goods, wares and merchandize sold and delivered by plaintiff to defendant, at his request, on credit, as were also the other goods, etc., in the declaration mentioned; and the defendant by false and fraudulent pretence obtained a term of credit for the price of said goods, etc., with intent to defraud plaintiff thereby, who thereby became the creditor of said defendant for

the said several sums, etc., and defendant did not at any time afterwards pay the said debt or sum of money or any part thereof to plaintiff or any other person. By means whereof defendant was guilty of a fraud pursuant to the provisions of the Insolvent Act of 1869."

The notices referred to, in addition to the general issue, were, 1st., That the said defendant did not, by false and fraudulent pretence, obtain a term of credit for the price of the goods, etc., in the declaration mentioned, or for any other goods, etc., for which the promissory note was given with the intent to defraud the plaintiff, as he hath alleged. 2nd. That defendant did not at any time obtain any goods, wares, etc., from plaintiff on any term of credit upon false or fraudulent pretence. 3rd. That defendant never had any term of credit from plaintiff.

The affidavits of Norman Robertson and Thomas R. Jones set forth the circumstances and facts which it was alleged established the fraud, the particulars of which, in the view taken of the case by the Court, are not material.

April 8. Dr. *Barker* argued in support of the motion.

This is an application for an award of imprisonment under sections 92 and 93 of the Insolvent Act of 1869. I think it is competent for the Court to make the order on being satisfied by affidavit of the fraud—the action being in this Court, it is the proper tribunal to apply to. There was a judgment by default, and there can be no trial of the damages. (RITCHIE, C. J. The Act says the plaintiff is bound to *prove* the fraud; and can that be done by affidavit? I do not see how the matter can be tried out on affidavits).

WELDON, J., referred to section 142.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C. J. The 18 Vic., c. 9, section 1, enacts that whenever any defendant in any action or suit, wherein debt or damages only are sought to be recovered, shall file, in the office of the Clerk, an offer and consent in writing to suffer judgment by default, the same shall be entered of record, and the plaintiff or his attorney may, at any time within ten days after he has received notice of such offer and consent, file, as aforesaid, a memorandum in writing of his acceptance of judgment for the sum so

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offered as debt or damages, and judgment may be entered up accordingly with costs.

It is clear, under section 92, that the defendant must be charged with the fraud in the suit or proceeding taken for the recovery of the debt or debts, and be declared guilty of it by the judgment rendered in such suit or proceeding; and by section 93 it is enacted that, whether the defendant in any such case appear and plead, or make default, the plaintiff shall be bound to prove the fraud charged, and upon his proving it, if the trial be before a jury, the Judge who tries the suit or proceeding shall, immediately after the verdict rendered against the defendant for such fraud (if such verdict is given), or, if not before a jury, then, immediately upon his rendering his judgment in the premises, adjudge the term of imprisonment which the defendant shall undergo, etc.

No judgment has been rendered in any suit or proceeding deciding the defendant guilty of the alleged fraud; and this is neither a case of a verdict rendered by a Judge, nor is it such a case of default as the Act clearly contemplates. The offer, under the 18th Vic., is a confession of the action *pro tanto*, and, when accepted, settles all issues and ends all controversy between the parties. The defendant by his plea and notices challenged the plaintiff to the trial of the issue of fraud, and gave him the option of accepting a confession and judgment for $1,425. The plaintiff accepted the latter, and cannot now ask a trial of any issues in the cause, or the further interference of the Court in relation to the charge of fraud—assuming an application to this Court as made by Mr. *Barker*, was the proper mode of carrying into effect the provisions of the Insolvent Act, which we by no means affirm. This is a peculiar and a *quasi* penal statute, and the power given to the Judge to award imprisonment under it is of such a character that it ought not to be exercised unless the case is brought clearly within the express words of the Act. We therefore think Mr. *Baker* had no *locus standi* to ask us to award imprisonment in this case, supposing we had the power.

Motion refused.

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April.

LOWELL *v.* McADAM *et al.*

Evidence—Damage to land—Irrelevant Questions.

In an action for overflowing plaintiff's land by means of a mill-dam, and thereby destroying his growing trees, plaintiff cannot be asked for what purpose he purchased the land, or how much he paid for it, such evidence being irrelevant to the question of damages.

This was an action on the case for injury done to the plaintiff's land and growing trees by overflowage caused by a mill-dam erected by the defendants. On the trial the defendants' counsel proposed to ask the plaintiff for what purpose he had purchased the *locus in quo*, and whether he would have given the sum he had paid for it if there had been no mill privilege on it. The learned Judge rejected the questions. A verdict being found for the plaintiff, a rule *nisi* for a new trial was subsequently obtained on the ground of improper rejection of evidence.

April 12. *Gregory* shewed cause.

The questions were merely hypothetical, and the answers could not in any way affect the damages. The only question for the jury was the condition of the land at the time, and amount of injury done to it.

Needham, in support of the rule.

The questions were legal, and the answers might have materially affected the damages. We had a right to put them on cross-examination.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

ALLEN, J. We think the questions proposed to be put to the plaintiff, as to the purpose for which he purchased the land, and whether he would have given the sum he paid for it if there had been no mill privilege on it, were properly rejected.

The question for the consideration of the jury was, what injury was done to the plaintiff's land and growing trees by the overflowage caused by the defendants' mill-dam? In considering this question it would be altogether immaterial what the plaintiff bought the land for, or how much he paid for it; and if the evidence had been admitted, and the plaintiff had stated that he bought the land on account of the mill privilege upon it, and not for agricultural purposes, the Judge must

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have told the jury that that had nothing to do with the question of damages, for even if he had purchased the land on account of a mill privilege upon it, that is no reason why he should not recover damages if he has been deprived of the use of any part of the land, or his growing trees have been killed by the overflowage. The extent of that damage was properly for the consideration of the jury.

The evidence, therefore, being altogether irrelevant, was properly rejected.

Rule discharged.

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April.

DOE DEM. JOHNSTON *v.* JARDINE.

Dower—View—Proceedings—Husband tenant in common—Arrears of dower.

When an order for view is made in an action for dower under the Act 21 Vic., c. 25, the proceedings should be the same, substantially, as under the writ of view, under the Act 4 Anne, c. 16.

If the husband was seized as tenant in common, the widow can only be endowed in common under the Act 21 Vict., c. 25, and not by metes and bounds.

Semble, That arrears of dower cannot be recovered unless the husband died seized of the land.

This was an action of ejectment brought to recover dower under the Act 21 Vic., c. 25.[1] At the trial before ALLEN, J., at St. John, a nonsuit was moved for on several grounds, which are fully noticed in the judgment of the Court. A verdict was found for the plaintiff, leave being at the same time reserved to the defendant to move to enter a nonsuit. In Michaelmas term, 1872, *W. Jack, Q.C.*, moved accordingly, and obtained a rule *nisi* for entering a nonsuit, or, failing that, a new trial. *Co. Lit.* 32 *b*; *Jones* v. *Jones*;[2] *Co. Lit.* 35 *a*; 2 *Tidd Pr.* 847, were cited.

Feb. 19, 1873. *D. S. Kerr, Q.C.*, shewed cause.

The defendant's possession is *prima facie* evidence of her being seized in fee: *Jayne* v. *Price*;[3] 2 *Wash. R. Prop.* 493; *Fish Dig.* 1093. The fact of a tenant-in-common being in possession of an estate is sufficient evidence of ouster of his co-tenants, and in the absence of any claim set up by a co-tenant, the defendant here must be presumed to be holding the freehold: *Co. Lit.*, 373 *b*; *id.* 243 *b*; 7 *Com. Dig.* 328; 1 *Rev.*

[1] See Ante 170. [2] 2 C. & J. 601. [3] 5 Taunt. 326.

Stat. 402; *Adams Ej.* 50, 54, 88, 90, 112, 114, 135, 136. Then it is objected that the cause was not tried by a proper jury of view, as required by the Act 21 Vic., c. 25. It is submitted, however, that the requirements of the Act were observed in this respect; but, even if not, that is no ground for a new trial, the presiding Judge having exclusive power over the jury. The defendant should have challenged the array.

W. Jack, Q.C., was heard in support of the rule.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C. J. A rule was obtained for a nonsuit or a new trial in this case on the following grounds :—

1st. That the cause was not tried by a proper jury, as required by the Act 21 Vic., c. 25.

2d. That the deceased husband of the lessor of the plaintiff was only a tenant in common of the land out of which the dower is claimed, and, therefore, no dower could be assigned without partition.

3d. That it was not shewn that the defendant was owner of the freehold, and therefore that she was not a proper person to assign dower.

4th. That as the husband of the lessor of the plaintiff did not die seized, she could not recover any arrears of dower.

As to the first ground—The 2nd section of the Act directs that "a Judge in case of defence shall make an order directing a view to be had, and the proceedings thereon shall be the same as heretofore had under a writ of view; and the sheriff, upon request, shall deliver to either party the names of the viewers, and shall also return such names attached to the order to the Clerk of *Nisi Prius*, who shall call them as jurors upon the trial; which return shall be the panel in such cause."

It was contended that, as the writ of view was abolished by the Act 18 Vic., c. 24, sec. 17, the provision of the Act 21 Vic., c. 25, directing a view, could not be carried out; but we see no difficulty about it, for though the writ is abolished, the practice which existed under it may clearly be followed in cases where a view is ordered. Now what were the

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proceedings under a writ of view? By the statute 4 Anne, c. 16, the Court was authorized to order special writs of *distringas* or *habeas corpora* to issue, by which the sheriff, or other officer to whom they were directed, should be commanded to have six out of the first twelve of the jurors named in such writ, or some greater number of them at the place in question, some convenient time before the trial, who then and there should have the matters in question shewn to them by two persons in the writ named, to be appointed by the Court; and the said sheriff or other officer who executed the writ, should return that a view had been had according to the command of the writ: 2 *Tidd's Pr.* 847. In page 849 it is said, that "before the rule or order for a view is drawn up, an application should be made to the opposite attorney for the name of his shewer, and the names of both shewers must be inserted in the rule or order, and also in the writ of distringas, etc., with the time and place of meeting for proceeding on the view. If the opposite party will not name a shewer, an appointment for that purpose should be obtained on the rule from the Master or Prothonotaries, who, in case of non-attendance, will name one *ex parte.* The rule or order being drawn up, a copy of it must be served on the opposite attorney, and the original left with the sheriff, together with the names of the jurors, if *special,* and he will summon them; if *common,* he will summon such as he thinks proper."

Why cannot substantially the same practice be adopted under this Act? Unless it is adopted, and shewers named, etc., how can the proceedings, under the Judge's order for a view, be "the same as heretofore had under a writ of view?" We see no difficulty in applying the general course of proceeding, under a writ of view, to the proceedings under this Act. In fact the Judge's order is simply substituted for the writ of view—the proceedings under the order being the same, substantially, as under the writ. No doubt the object of the Act, in requiring the sheriff to give to any party requiring it, the names of the viewers, was to enable the party to point out to the sheriff any objections that might exist to any of the viewers named; as, for instance, affinity, interest, or other disqualification; but not for the purpose of challenging the viewers in the ordinary legal sense of that term. As the plaintiff has not, under the order for view, followed strictly the practice as established and formerly in use under the writ of view, the trial was, in this respect, irregular; but we do not by any means agree with defendant's counsel in his contention, that the cause can only be tried by the viewers selected by the sheriff.

We do not think it absolutely necessary that all the jurors who attended as viewers, and were returned by the sheriff, should be sworn as jurors to try the cause. The Act does not so declare: it only states that they shall be the *panel* in such cause. But there is nothing in the Act, either expressly or by implication, interfering with, or taking away the rights and privileges which either of the parties had by the existing law and practice of the Court when a cause was called on for trial, such as the right to pray a *tales*, or to challenge peremptorily or for cause. The jurors returned by the sheriff, on the order for view, are substituted for the ordinary jury panel, either party having the same rights and privileges as pertain, or are incident to, a trial in an ordinary case. Had none of the jurors returned by the sheriff appeared, when called for the trial, then the cause must have gone off for default of jurors, as in the case where no jurors appear on the general panel, or where a special jury has been struck, and none of them appear: see *Holt* v. *Meddowcroft*;[1] *Hague* v. *Hall*.[2] But where some of the general panel, or of the special jurors, as the case may be, attend, the jury may be made up by the addition of talesmen—there being one of the original jury to form the nucleus. In special jury cases it is the practice in England to complete the jury by talesmen—*Snook* v. *Southwood*;[3] *Satliffe* v. *Brown*;[4] and *Marsh* v. *Coppock*[5]—though the words of the jury Act 6 Geo. 4, c. 50, sec. 30, are, that "every jury so struck shall be the jury returned for the trial of such issue;" words quite as strong as our Act 21 Vic., c. 25, that the names returned by the sheriff "shall be the panel in such cause." According to the practice under the writ of view, it was not necessary that all the jurors who took the view should be sworn on the trial. Such of them as appeared were first sworn on the jury to try the cause, and then so many were to be drawn and added, as should, after all defaults and challenges allowed, make up a full jury for the trial of the cause: 2 *Tidd Pr.* 907. We think, therefore, in this case, that where one of the jurors returned by the sheriff made default, and two others were challenged by the defendant, the plaintiff had a right to complete the jury by talesmen. The express authority given to the Court to grant a view during the progress of the trial of any cause, prevents the possibility of any injury arising from all the jury not

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[1] 4 M. & S. 467.
[2] 5 M. & G. 693.
[3] Ry. & M. 429.
[4] 2 M. & Rob. 100.
[5] 9 C. & P. 480.

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having seen the premises. In this case that course was adopted: all the jurors who tried the cause also viewed the premises, so that, substantially, the directions of the Act were complied with, and the objections on this part of the case were reduced to mere technicalities.

As to the second objection—There is no doubt about the fact, that under his father's will, John Johnston only took an undivided seventh in all the real estate, of which the land, out of which dower is claimed in this action, was a part; that his right and title was sold at sheriff's sale, and purchased by his mother, whereby she became a tenant in common with the other devisees; and that she and two of the other co-tenants conveyed to Robert Jardine, the defendant's husband. Now it is clear that they only conveyed three undivided sevenths of the land out of which the dower is claimed, and, therefore, though the lessor of the plaintiff would be entitled to her dower, (Cruise's Dig. *Dower*, c. 2, sec. 7) she could not have it assigned by metes and bounds. In 1 *Wash. R. Prop.* 158, it is said that "the estate of a tenant in common is subject to dower as if held in severalty; but it will be set off in common, unless partition be made during the life of the husband between the tenants." And in page 236 it is said, that where from the nature of the estate out of which dower is to be assigned, it cannot be done by metes and bounds, it may be done by giving a share in common of the estate: as, where the estate was held by the husband as tenant in common. In that case the sheriff cannot set apart any portion of the estate as the widow's dower, and she becomes, by the assignment, tenant in common with the owners of the land. And in Cruise's Dig. *Dower*, c. 3, sec. 9, it is said that "an assignment by metes and bounds can only take place where the husband is seized in severalty; for where he is seized in common with others, his widow cannot be endowed by metes and bounds, for she, being in *pro tanto* of her husband's estate, must take it in the manner in which he held it." The same doctrine is laid down in Cruise, Title XX, sec. 24, 25; Bac. ab. *Dower* (B) 3, and Co. Lit. 32 *b*. According to these authorities, the assignment, having been by metes and bounds, cannot be sustained; but as the lessor of the plaintiff was entitled to an assignment in common, the defendant is only entitled to a new trial, and not to a nonsuit.

In this view of the case it is unnecessary to consider the other points, though we may say, with respect to the arrears of dower, that the ans-

wer of the jury having been that they had taken into consideration the arrears in awarding the dower, the inference would be that they had included arrears in the value of the land assigned; if so, we think such a course improper—that arrears, if any, should have been assessed in a sum certain by way of damages. But we more than doubt as to plaintiff's right to arrears. *Jones* v. *Jones*,[1] clearly establishes, that to entitle a widow to damages it must be both alleged and proved that her husband died seized, and the tenant would also seem to be excused from paying damages for the detention of dower, unless the demandant had required her dower: Co. Lit, 32 *b*; 3 *Bac. Abr.* 246.

Rule absolute for new trial.

DOE DEM. BRYSON *v.* FLEET.

Practice—Rule nisi—Remodelling of rule.

Where a rule *nisi* has been granted to enter a nonsuit pursuant to leave reserved at the trial, the Court may remodel the rule and order a new trial on payment of costs by the plaintiff.

Ejectment, tried before WETMORE, J., at the Sunbury Circuit. The plaintiff claimed title to the land in dispute, under a sheriff's deed. On the trial an exemplification of judgment was put in as a part of the plaintiff's case, which was signed on the 20th September, 1869; the execution under which the land was sold was dated the day previous—the 19th September. The defendant contended that to give validity to the sheriff's deed, it was necessary there should be a judgment and proper execution, and that as the execution in this case bore a date prior to the judgment, the sale and, therefore, the deed, was invalid. A verdict was entered for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit, and in Michaelmas term, 1872, *Rainsford* moved accordingly, and obtained a rule *nisi*, against which on

April 10, 1873, *Blair* shewed cause.

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[1] 2 C. & Jer. 601.

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Doe d. BRYSON *v.* FLEET.

It was not necessary to prove any judgment at all. (*Per Curiam.* It has always been held to the contrary.) All the plaintiff had to do was to put in the sheriff's deed and the execution : 1 *Rev. Stat.* 291, sec. 11. The counsel then read an affidavit to show that in reality the execution was regularly issued after judgment was signed, but was, through mistake, tested of the day previous.

Rainsford, in support of the rule.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

ALLEN, J. The only question in this case is, whether we are obliged to order a nonsuit—leave to do so having been reserved at the trial—or whether, instead thereof, a new trial can be granted. We see no reason why the plaintiff should be put to the expense and delay of bringing another action, if, by ordering a new trial, we can give the defendant, substantially, all the benefit he would gain by a nonsuit, namely, the payment of his costs. If the plaintiff, on another trial, can supply the defect in his evidence, we think he should be allowed to do so without any unnecessary expense, and that the Court should remodel the rule, (see *Higgins* v. *Nichols,*[1]) and order a new trial on payment of the costs of the former trial, and of the argument on the rule to enter a nonsuit—such costs to be paid within twenty days after taxation; otherwise the rule to be absolute for entering a nonsuit.

Judgment accordingly.

[1] 7 Dowl. 553.

1873.
April.

JUSTICES OF NORTHUMBERLAND *v.* RUSSELL.

Practice—Notice of trial—Term's notice—When not necessary.

A term's notice of intention to proceed is not necessary, though four terms have elapsed since issue joined, provided the plaintiff brings the cause to trial at the first Circuit, when it could be tried after issue joined.

In Michaelmas term, 1872, *Morrison*, on behalf of the defendant, obtained a rule *nisi* to set aside the verdict in this cause for irregularity. Issue was joined on the 5th September, 1871—too late for the plaintiff to give notice of trial for the Circuit of that year. Notice of trial was served on the 26th May, 1872, for the then next Circuit. It was now contended that the plaintiff should have given a term's notice of his intention to proceed to trial, four terms having elapsed since issue joined: *Collins* v. *Kirlin*.[1]

April 21. *S. R. Thomson, Q.C.*, shewed cause.

King, A. G., in support of the rule.

Per Curiam. We think the rule as to a term's notice ought not to apply in this case. Issue was joined on the 5th September, 1871—too late for the plaintiff to give notice of trial for the Circuit of that year;—there was no other proceeding that the plaintiffs' attorney could take in the cause until he gave notice of trial for the Circuit in 1872, and we think he was not bound to give more than the usual notice required by the practice; that a cause cannot be said to be "slumbering" if the plaintiff brings it to trial at the first opportunity he has of doing so, after issue joined, though four terms have elapsed; and that the defendant is not entitled to a term's notice of the plaintiff's intention to proceed in such a case, as he cannot have been taken by surprise by any delay or suspension of the proceedings, as he may be in cases where issue has not been joined. Therefore, whether there was an express understanding or not, that the cause should be tried at the last Circuit, we think there was no irregularity in the plaintiffs' proceedings.

Rule discharged.

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[1] 4 All. 505.

1873.
April.

REGINA *v.* HARSHMAN.

Justice of the Peace—Jurisdiction—Civil cause—Tresspass to land—Title in question.

If in an action of trespass to land, tried before a Justice of the Peace, the defendant sets up title and offers a deed in evidence, and the plaintiff also gives evidence of deeds and of a title arising by estoppel, on which the Justice undertakes to decide; the title is *bona fide* in question, and the Justice has no jurisdiction.

This was an application for a *certiorari* to remove a judgment obtained by James Mugridge against Peter Taylor, in the Court of George Harshman, Esquire, a Justice of the Peace of Westmorland County, in an action of tort for trespass to real property.

A rule *nisi* was obtained by *E. L. Wetmore*, against which on

Feb. 14, 1873. *W. J. Gilbert* shewed cause; and

A. L. Palmer, Q.C., was heard in support of the rule.

The facts of the case are sufficiently stated in the judgment.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

WELDON, J. In this case the question is, whether the title to land was raised so as to take the matter out of the jurisdiction of the Justice. The plaintiff put in evidence a deed from G. F. Jarvis to the plaintiff, dated 26th April, 1870, and a deed from R. M. Jarvis to G. F. Jarvis, dated in January, 1849, of 75 acres of land, "situate lying and being in Shediac aforesaid, on the Scoudiac River, so called, being part of lot No. 3, originally granted to Henry Cornwall, bounded northerly by lot No. 2, southerly by the brook known as Mill Creek, containing all that part of lot No. 3, which lies to the North of the said creek." It appeared that the defendant claimed a part of this lot, and placed some stakes and forbid the plaintiff's man coming on that part northerly of the stakes; the land was in woods, five stakes and two trees were blazed, and the witness stated the defendant kept him a quarter of an hour from his work, and he estimated the damage at $1.50. The defendant claimed a nonsuit on the ground that it was not shown that Ralph M. Jarvis was ever in possession of the land upon which the trespass was committed, or that George F. Jarvis had ever been in actual possession under his deed.

The defendant then showed that his father, the late Abraham Taylor, had claimed to be the owner of the property, his going into possession and living on the place up to his death, about 22 years ago, and had rented it to Graves and Green, and received the rent. His mother, after his father's death, sold the house to George F. Jarvis. The defendant also tendered in evidence, from the Registry Office, a copy of a deed from William Graves and Susan his wife, to the defendant's father, and Alexander Nixon and Thomas Taylor. This was objected to on the ground that no notice had been given to the plaintiff as required by cap. 112, sec. 12, of Revised Statutes. The summons had been issued on the 3d April, 1871, returnable on the 11th. In answer to the evidence of the defendant, the plaintiff gave evidence to rebut the case of possession, and that Abraham Taylor died on the premises; that the widow of Taylor sold the house built by Taylor, and gave up the possession, and *that Taylor and Nevers had sold the property*, as it appeared from searching the records. Upon this evidence the Magistrate decided the title of land did not arise, and he gave the plaintiff judgment for eight dollars for the alleged trespass.

It is clear that if reasonable evidence is given to show the title of the plaintiff is disputed, which renders it necessary to go into rebutting evidence—the searching of the records—to show that the father of the defendant had conveyed away his right to the land, evidence which, in a court of law, would not be allowed, and that the certified copies of deeds were excluded because 14 days' notice had not been given pursuant to the Revised Statutes, clearly shows the defence of title set up was *bona fide*, and, therefore, the duty of the Justice to abstain from going on further in the suit.

In *Mountnoy* v. *Collier*[1] the Judges lay it down, if it appears the question of title is *bona fide* raised, the Justice's Court ought to stop proceeding further. In this case there is the fact proved that the father of the defendant died seized of this land; that was attempted to be got over by Jarvis stating that he had leased it to him, though he could not remember he ever paid him rent, and that Ralph Jarvis had possession, but does not state how, or in what manner, he had possession. The possession—

[1] 1 E. & B. 630.

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in whom it was after Taylor's death—would certainly be a question of fact to be submitted to a jury—when the documentary titles—the plaintiff being allowed to put in his—do not show that Taylor, the defendant's father, had ever transferred his title, which the plaintiff showed was once in him.

In *Lawford* v. *Partridge* [1] the plaint was in trespass for breaking a close and cutting fences. The defendant went into evidence to show title, upon which the plaintiff was nonsuited, and the Court gave costs. Upon a rule for prohibition to the County Court to restrain him from issuing execution for costs, Held by the Court that, so soon as the title comes in question, the Court cannot nonsuit, and could only declare its own incompetency to try, and direct the suit to abate.

In *Chew* v. *Holroyd*,[2] on the trial of a plaint for a trespass committed by the breaking of doors of certain rooms in a cottage of the plaintiff, the plaintiff's case was, that he had let the defendant a portion only of the cottage, and had reserved to himself the rooms in which the trespass was committed. The defendant's case was that the plaintiff had let the whole cottage. Held, that the County Court had no jurisdiction; and the rule for a prohibition was made absolute. The cases of *Baston* v. *Carew*;[3] *Aldridge* v. *Haines*;[4] *Reg.* v. *Bolton* [5] were cited.

In *Marsh* v. *Dewes*,[6] which was an action of trespass for entering a dwelling house; and at the outset of the case, the defendant's counsel objected that it involved a question of title, and, consequently, the County Court had no jurisdiction. This being denied on the other side, the Judge said he would proceed with the case so far as to ascertain whether there was any *bona fide* question of title , and, if he found there was, he would proceed no further. After the evidence was given, the Judge said he found there was no evidence to go to the jury of a *bona fide* question of title; and he added that he felt more bound to make this inquiry very strictly, as it appeared to him from what transpired, that the plaintiff had probably been fraudulently ousted from the possession of the house, and the defendant, a poor man, incapable of paying any costs

[1] 3 Jur. Exch. 271 ; 1 H. & N. 621. [2] 8 Ex. 249. [3] 3 B. & C. 649.
[4] 2 B. & Ad. 395. [5] 1 Q. B. 66. [6] 20 E. L. & E. 356 ; 17 Jur. Exch. 558

if an ejectment should be brought against him, put in, in the hope that the plaintiff might not, under such circumstances, think it prudent to take so expensive a proceeding.

PARKE, B. "This is a perfectly clear case, and the rule must be made absolute. If the question here had been respecting damage done to the dwelling house or the value of goods taken in it, and the defendant had set up a false title to the house or goods, in order to prevent the Judge exercising his rightful jurisdiction, there would have been a *mala fide* claim of title, and the County Court would have had jurisdiction of the cause. But the question raised here, and the question which the parties came to try, was, had the defendant a right to this dwelling house as against the plaintiff? That is a claim of title to land, and whether made *bona fide* or *mala fide*, is immaterial for the present purpose. On that question, the Judge of the County Court has improperly taken on himself to pronounce an opinion that the defendant's claim was not well founded." ALDERSON, B. "It would open a very wide door to jurisdiction in the County Court, if a County Court Judge could say, 'such or such a claim to real estate is not *bona fide*.' If the Statute does not permit him to decide on the claim at all, how can he try whether it is a *bona fide* one or not? Does not his doing so imply that in his own mind he has determined on the validity of the title of one of the parties?" MARTIN, B. "A man puts in a claim under a forged deed, for which formerly he might have been hanged, it is not the less a claim on that account." The rule was made absolute for a prohibition.

In *Mountnoy* v. *Collier*[1] COLERIDGE, J., says. "All that is necessary to decide in this case is, that the Judge ought to have received this evidence, on which a question might arise as to the title between the plaintiff and Ingram, and as soon as the Judge is satisfied that the question of title is *bona fide* raised, he should stop the cause and go no further." WIGHTMAN, CROMPTON, and ERLE, J.J., all concur that, so soon as a question of title *bona fide* arises, the jurisdiction ceases. See also *Sloan* v. *Davis*.[2]

Rule absolute for certiorari.

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[1] 1 E. & B. 628.

[2] 2 Allen 593.

1873.
April.

LADDS *v.* VERNON.

Pleading—Notice of defence—Evidence under general issue—Not confessing and avoiding.

A notice of defence under the Act 13 Vic., c. 32, will not be set aside when there is doubt as to whether the matter stated might be given in evidence under the general issue; nor because it does not in terms confess and avoid the cause of action alleged in the declaration.

This was an action of trespass *quare clausum fregit* and for assault, the first count of the declaration alleging a breaking and entry, and the second and third charging defendant with assault and battery. Defendant pleaded the general issue; and several notices of defence to the second and third counts were also given under the Act 13 Vic. c. 32, the second, third, fourth and fifth of which notices

D. S. Kerr, Q.C., on behalf of the plaintiff, moved, on a former day of this term, to set aside, and obtained a rule *nisi* for that purpose.

The notices sought to be set aside were as follows :

2nd Notice.—That defendant before, etc., was a Director of the Commercial Bank of New Brunswick, and as such Director, in absence of the President of said Bank, had the charge and custody of certain ledgers, etc., belonging to said Bank, and whilst defendant as such Director had charge and custody of such books, one, E. Saunders Ladds, daughter of plaintiff, with plaintiff's knowledge and at her instance, and without the knowledge and against the will of said defendant, as such Director, clandestinely abstracted and removed from the office of said Bank, a certain valuable ledger or book of account; and said defendant having reasonable cause to believe, and believing that said ledger was concealed in or about a certain dwelling house in which certain rooms and apartments were then occupied by plaintiff and said E. Saunders Ladds, lawfully and peaceably, and by leave and license of plaintiff entered into and upon said dwelling to search for said ledger, and whilst said defendant was so lawfully, and by leave, etc., in and upon said dwelling, plaintiff accidentally, and by her own carelessness, negligence, and improper conduct, and without any fault of defendant, received a very slight blow on the head from a door in defendant's hands, which very slight blow is the supposed assault.

The 3rd notice stated the removal of the book as in the preceding notice, and that defendant, suspecting—and having reasonable cause to suspect—that it was concealed in the dwelling house of one Jeremiah Brundage, in which plaintiff and her said daughter, E. Saunders Ladds, occupied certain rooms, by the license of said Brundage entered into and upon said dwelling house to search for said book, and whilst defendant was so lawfully, and by said license, in and upon said dwelling, plaintiff, unlawfully attempting to exclude and shut out defendant from said dwelling, accidentally, and by and through her own carelessness, negligence and improper conduct, without any fault or blame of defendant, was struck a slight blow on the head by a door in defendant's hands, which blow from said door is the said supposed assaults.

4th Notice.—That the alleged asaults and batteries, if any such there were, resulted from plaintiff's own negligence, and without any blame or fault of defendant.

5th Notice.—That the alleged assaults and batteries, if any such there were, were involuntary and without any blame on defendant's part, and occasioned by plaintiff's own misconduct.

On moving for the rule, the following cases and authorities were cited: *Chit. Pl.* 556; *Hill* v. *Allen*;[1] *Sinclair* v. *Hervey*;[2] 3 *Stark. Ev.* 1,119; *Goodman* v. *Taylor*.[3]

April 15. *Duff, Q.C.*, and *S. R. Thomson, Q.C.*, shewed cause.

If the facts alleged in the second notice can be given in evidence under the general issue, what harm is done? *Com. Dig.* "Pleader," p. 116; *Blower* v. *Great Western Railway Co.*[4] But we say they cannot be given under the general issue. There is confession and avoidance here; the defendant admits that plaintiff received a blow by his hands. *Blades* v. *Higgs*;[5] *Hall* v. *Fearnly*,[6] are the cases under which we framed the notice: if the injury arises from inevitable accident it may be given under the general issue. The notice shows sufficient avoidance, because it alleges that the act was done without blame on the defendant's part: *Alderson* v. *Waistell*;[7] *Wakeman* v. *Robinson*;[8] *Ros. Ev.* 801. A de-

[1] 5 D. P. C. 471.
[2] 2 Chit. R. 642.
[3] 5 C. & P. 410.
[4] L. R. 7 C. P. 655.
[5] 7 Jur. N. S. 1289; 10 C. B. N. S. 713.
[6] 3 Q. B. 919.
[7] 1 C. & K. 358.
[8] 1 Bing. 213.

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LADDS v. VERNON.

fence that the injury resulted from the act of defendant must be specially pleaded. The third notice confesses the assault by the door in the defendant's hands, and the avoidance is that it was by plaintiff's own fault. If the accident resulted from plaintiff's negligence it is no trespass: *Waite* v. *North Eastern Railway Co.*;[1] *Lynch* v. *Nurdin*;[2] *Lygo* v. *Newbold*.[3] The strict rules of special pleading are not applied to notices. The fourth and fifth notices are more general—that the assault was caused by the plaintiff's own negligence, and without any fault of the defendant. If these facts are proved the case is answered.

D. S. Kerr, Q.C., in support of the rule, contended, 1st. That there was no confession of the assault and battery stated in the 2nd and 3rd counts of the declaration. 2nd. The notices amounted to the general issue, and were, therefore, not warranted by the Act 13 Vic. c. 32. 3rd. The avoidances and other parts of the notices were immaterial, and 4th. The notices were uncertain and defective. *Gibbons* v. *Pepper*;[4] *Weaver* v. *Ward*,[5] and *Stark. Ev.* 1,119, were cited.

Cur. Adv. Vult.

The judgment of the Court (ALLEN, WELDON, FISHER and WETMORE, J.J.,) was now delivered by

ALLEN, J. This was an application to set aside the second, third, fourth and fifth notices of defence in this case, on the ground that the two former did not confess and avoid the assaults charged in the declaration, and amounted only to the general issue, and that the latter were bad for uncertainty.

The object of the Act 13 Vic. c. 32, was to get rid of the technicalities of special pleading, and to enable defendants to state their defences by notice, in short and general terms. But if the matter stated would, if proved, be no defence to the action, and would, if pleaded, have been bad on general demurrer, the notice will be set aside: *Dowling* v. *Trites*;[6] *Wilson* v. *Street*.[7]

The objections taken to the notices in this case would only have been ground of special demurrer to a plea; and though special demurrers

[1] E. B. & E. 719. [2] 1 Q. B. 29. [3] 9 Exch. 302. [4] 1 Ld. Raym. 38.
[5] Hob. 134. [6] 2 Allen 520. [7] 2 Allen 629.

are abolished by the Act 14 Vict. c. 20, the plaintiff may, perhaps, still have a right to object to the notices. But we think the second and third notices are substantially sufficient; for if it is necessary to confess and avoid the assault, the defendant has confessed it by stating that the blow which the plaintiff received was given by a door in his (defendant's) hands; and he has avoided it by stating that the plaintiff received the blow accidentally, and by her own carelessness and negligence, and without any fault on his part. If this had been stated in a plea, we are not prepared to say that it would have been bad on general demurrer; therefore we think the notices ought not to be set aside on this ground. As to their amounting only to the general issue, the plaintiff cannot certainly be prejudiced by being informed what the real defence is; and, admitting that Mr. Kerr may be right, that it is only some matters of defence which cannot be given in evidence under the general issue, that the defendant is entitled to give notice of under the Act; there is sufficient doubt of the defendant's right to do this, under the case of *Hall* v. *Fearnley*,[1] to justify us in refusing to set aside the notices, particularly as we cannot see how the plaintiff can be injured, or the trial of the cause in any way prejudiced by allowing them to stand. We think the fourth and fifth notices are defective; the rule will therefore be made absolute for setting them aside. There will be no costs on either side.

Judgment accordingly.

[1] 3 Q. B. 919.

CASES DETERMINED

BY THE

SUPREME COURT OF NEW BRUNSWICK,

IN

TRINITY TERM, XXXVI VICTORIA.

1873.
June.

Ex parte CHANDLER ; *In re* TAYLOR AND OTHERS.

Rector—Induction—Necessity for—32 Vict. c. 6—Election of Churchwardens and Vestrymen.

When a priest of the Church of England in holy orders has been nominated under the Act 32 Vict., c. 6, to fill the office of Rector of a Parish, and has been duly presented to the Bishop, and instituted, and a mandate has issued to induct him, and he has actually entered on the duties of Rector of such Parish, he is the legal Rector, though he may not have been inducted, and is entitled by law to preside at the meeting for election of Church Wardens and Vestrymen.

This was an application on the part of E. B. Chandler, Jr., of the Parish of Moncton, for leave to file an information in the nature of a *quo warranto,* calling on Ezekiel Taylor and others to shew cause why they respectively claim to exercise the offices of Churchwardens and Vestrymen of St. George's Church, in the Parish of Moncton. A rule *nisi* having been previously obtained, on

June 21, *E. L. Wetmore,* shewed cause.

Duff, Q.C., was heard in support of the rule.

The facts in the case are stated in the judgment.

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C.J. We think that when a Priest in Holy Orders of the Church of England has been nominated, under the Act 32 Vict, c. 6,

to fill the vacant office of Rector of a Parish, and has been duly presented to the Bishop, and has been instituted by His Lordship, and a mandate has been issued to induct him, and the person so nominated, presented and instituted has entered on the duties of the office of Rector of such Parish (all of which facts are admitted in this case) he is the legal Rector, though he may not have been inducted. The want of actual induction may touch the question of the Rector's legal enjoyment of the temporalities of the parish, of which he may not be in full and complete possession, but this does not prevent his exercising the duties and functions of Rector, spiritual or otherwise. Therefore, Mr. Walker, as Rector of Moncton, was the person entitled, and whose duty it was by law, to preside at the last Easter Monday meeting held for the election of Churchwardens and Vestrymen; and having attended such meeting, and having been, as we think, in effect prevented from so presiding by the action of the meeting, and having retired under protest, such meeting could not elect a chairman in the place of the Rector and proceed with the election of Churchwardens and Vestrymen: therefore the meeting presided over by Dr. Chandler had no legal authority to make such election. We refer to the following authorities in support of the view we have taken from the first opening of this matter as to the Rector's position previous to induction:—

"The clerk, by institution, hath the care of souls committed to him, and is answerable for any neglect in this point. * * * * As to the temporalities: whereas presentation doth give to the clerk a right *ad rem*, so institution or collation do give him a right *in re*; and, therefore, in virtue of collation as well as of institution, the Clerk may enter into the glebe, and take the tithes; though, for want of induction, he cannot yet grant or sue for them": 1 *Burns' Eccl. Law*, 170.

"By institution the church is full, and plenarty by six months is pleadable against all persons but the King."—*Ibid.*

"After institution the Clerk is not complete incumbent till after induction, or, as the canon law calls it, corporal possession. For by this it is that he becomes seized of the temporalities of the church so as to have power to grant them or sue for them; by this he is unexceptionably entitled to plead, (as occasion shall require) that he is parson *imparsonee*; and by this also the church is full, not only against a common person, (for so it is by institution), but also against the King; and by

1873.
Ex parte CHANDLER.

consequence, it is completely full, and the Clerk is complete incumbent or possessor, on which account, it is compared in the books of common law, to livery and seisin, by which possession is given of temporal estates."—*Ibid*, 176.

Leave will therefore be granted to file the information.

1873.
June.

COTTER *v.* BROWNELL.

Bail—Discharge of—Irregularity in affidavit to hold to bail—Amendment in entitling of declaration.

An amendment of the declaration by entitling it specially of the last day of the Term, instead of the Term generally, where there is no variance in the cause of action, does not discharge the bail, the entitling of the declaration being only a fiction.

The affidavit to hold to bail in this case was objected to on the grounds: 1st, That it was not entitled in the Court, though sworn before a commissioner; 2nd. It stated defendant's indebtedness both for goods sold and delivered, and in same amount for account stated, without stating positively it was the same debt. 3d. That deponent was illiterate, and there was no certificate of the affidavit having been read over; but Held, That even if any irregularity in the affidavit or writ would be a ground for relieving bail, the objections taken to this affidavit were not sufficient.

On a former day of this term, *S. R. Thomson, Q.C.*, moved on behalf of A. Chipman Smith and John McMillan, the defendant's bail in this suit, to relieve them from their recognizance on the following grounds: 1st. The affidavit to hold to bail is not entitled in the Court. 2nd. The amount stated in the affidavit is not endorsed on the writ, there being two sums sworn to, and only one endorsed. 3rd. The affidavit is uncertain as to what sum is due and unpaid. 4th. The plaintiff is an illiterate person, and therefore the affidavit should have certified that it was read over to him. 5th. The amendment of the declaration, made on the trial, by entitling it specially of the last day of the Term instead of the Term generally. The affidavit to hold to bail stated that the defendant was justly and truly indebted to the deponent "in the sum of eight hundred and ninety-three dollars and fifty-two cents for goods, meats and vegetables sold and delivered by this deponent to the said Richard S. Brownell at his request, and also for that amount due from the said Richard S. Brownell to this deponent on an account

stated and settled between the said Richard S. Brownell and this deponent, which said sum is still due and unpaid to this deponent from the said Richard S. Brownell."

The capias was endorsed for bail in the sum of $893.52.

Rule *nisi.*

June 23. *A. L. Palmer, Q.C.*, shewed cause, and read an affidavit of the plaintiff's attorney, shewing that the writ issued on the 19th October, 1872, returnable 26th October; notice of special bail given 22nd November; entry docket, writ and affidavit filed 4th November; declaration filed 22nd November; and copy served 26th Noveber. The application is too late to relieve the bail for defect in the affidavit: *Jones* v. *Price.*[1] There is no difference between applications by defendant and by the bail; in fact the rule is stricter against bail: *D'Argent* v. *Taylor;*[2] *Desborough* v. *Coppinger;*[3] *Norton* v. *Danvers;*[4] *Knight* v. *Dorsey.*[5] Bail cannot ordinarily take advantage of irregularity in the writ or affidavit: *Urquhart* v. *Dick.*[6] An affidavit need not be entitled in the Supreme Court, where it is sworn before a commissioner: *White* v. *Irving.*[7] The affidavit is sufficient; it is only one sum that is sworn to as being due, $892.53. A man may owe a sum of money in three ways—for goods sold, on an account stated, and on a promissory note. Then it is objected that the amendment discharges the bail, but that does not affect the cause: the bail undertook for the cause of action in the writ and affidavit: *Imp. Pr.* 187; *Brazier* v. *Jones;*[8] 1 *Chit. Pr.* 659; *Marsh* v. *Blachford.*[9]

S. R. Thompson, Q.C., in support of the rule.

The affidavit ought to be entitled to the Court. This is the first time the question has been raised in this Province. (*Per Curiam.* That is so; but the case in 5 Dowl. seems to the contrary of your contention.) Then, there should have been a certificate of the commissioner that he read the affidavit to the plaintiff. There are two sums sworn to in the affidavit, quite distinct; and the latter part of the affidavit makes it clearly bad, as it leaves it uncertain: *Taylor* v. *Wilkinson.*[10]

Cur. Adv. Vult.

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[1] 1 Ea. 81. [2] 1 Ea. 330. [3] 8 T. R. 77. [4] 7 T. R. 375. [5] 1 B. & B. 48.
[6] 3 Dowl. 17. [7] 5 Dowl. 289. [8] 6 B. & C. 196. [9] 1 Chit. R. 323. [10] 3 A. & E. 784

1873.

COTTER v. BROWNELL.

The judgment of the Court was now delivered by

ALLEN, J. This was an application on behalf of the defendant's bail, to enter an exoneretur on the bail-piece, on the ground of alleged defects in the affidavit to hold to bail, and of a variance between the cause of action declared on, and that on which it was recovered.

Assuming that any irregularity in the affidavit or writ would be a ground for relieving the bail, (which we by no means admit; as we do not find any such ground for relieving bail stated in any of the books of Practice), we do not think there are any such irregularities in this case as would warrant us in discharging the bail.

The only question then is, whether the amendment of the declaration by entitling it specially of the last day of the Term, instead of the Term generally, discharges the bail. We are clearly of opinion that it does not. There is no variance between the cause of action for which the plaintiff held the defendant to bail, and that for which he recovered —it was identically the same cause of action: the entitling the declaration was only a fiction, and the amendment of it did not vary the cause of action.

Application refused.

1873.

June.

DORAN *v.* WILLARD.

Fixtures—Building resting on land by its own weight, and not affixed to it—Whether part of freehold—Intention.

When a building is erected on land, but is no further attached to it than by its own weight, it will become part of the freehold if it is apparent it was erected with this intention.

This was an action of trover for a framed building which the plaintiff had erected on a lot of land in Newcastle, which he had agreed to purchase from Mrs. Davidson, and on which he had paid a small instalment, having three years to pay the balance. He purchased the land for a building lot.

The building fronted on the line of the street, and rested on wooden blocks placed upon the ground. It was enclosed, and the roof shingled, and the upper story lathed, and used as a carpenter shop. The lower story was quite finished, and was intended for a shop. About a year

after the building was put up, the plaintiff got in debt and left the place, and soon afterwards Mrs. Davidson sold and conveyed the land to the defendant.

The only question in the case was, whether the building was a chattel—the subject of an action of trover—or whether it became part of the freehold and passed to the defendant by the deed: the plaintiff claimed some other articles, his right to which was not disputed. A verdict was found for the plaintiff for the value of the building and the other articles, with leave to the defendant to move to reduce the verdict by the amount of the building, if the Court should think it passed to him by the deed.

A rule *nisi* having been obtained accordingly, on

April 10. *S. R. Thomson, Q.C.*, showed cause and contended that, *prima facie,* the building was a chattel, and it was the defendant's duty to show that it was intended to be a fixture. *Climie* v. *Wood;*[1] *Longbottom* v. *Berry;*[2] Ex parte *Astbury;*[3] *Mackintosh* v. *Trotter;*[4] *Wiltshear* v. *Cotterell;*[5] *Wansbrough* v. *Maton;*[6] *Boyd* v. *Shorrock;*[7] and *Holland* v. *Hodgson,*[8] were cited.

D. S. Kerr, Q.C., in support of the rule.

Most of the cases on the other side have no application, because in them the question was between landlord and tenant: *Elwes* v. *Mawe.*[9] The proper use and adaptation of this building required no affixing to the soil: *D'Eyncourt* v. *Gregory.*[10] The onus was on the plaintiff to show that it was not intended to be permanent, which, on the contrary, all the facts and circumstances show was the intention: *Climie* v. *Wood.*

Cur. Adv. Vult.

The judgment of the Court was now delivered by

RITCHIE, C.J. We think that it is impossible to apply in this country, in all cases, the rule that a building, to become part of the freehold, must be in some way affixed to the soil. We know it as a fact, that in every part of the country there are buildings erected for dwelling houses, and used as such, which are in no way affixed to the land, (in the sense in which that word is often used) and only resting upon it by their own weight. It was proved in this case that there were many buildings in

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[1] L. R. 3 Exch. 257; L. R. 4 Exch. 328. [2] L. R. 5 Q. B. 123.
[3] L. R. 4 Ch. 630. [4] 3 M. & W. 184. [5] 1 E. & B. 674. [6] 4 A. & E. 884.
[7] L. R. 5 Eq. 72. [8] L. R. 7 C. P. 328. [9] 2 Sm. L. C. 99. [10] L. R. 3 Eq. 382.

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DORAN v. WILLARD.

Newcastle and elsewhere. No one would seriously contend that such a building, erected by a man on his own land was a mere chattel, and on his death would pass to his executor, because it had no foundation let into the land, and could be taken away without disturbing the soil.

We think the proper question in such cases is the intention with which the building was erected. What might be only a chattel if erected by a tenant for years, might become a part of the soil if erected by the owner of the land, or one claiming to be such. If the intention is apparent that the building should become part of the land, it will become part of the land, though it is no further attached to it than by its own weight: *Holland* v. *Hodgson*.[1] In the present case the plaintiff agreed to purchase the land for a building lot; he contemplated becoming the owner of the land when he put up the building; he intended the lower part of it to be occupied as a shop or store; it was in the position where a building intended for such a purpose would naturally be placed—on the line of the street; therefore, not only the character of the building, but the circumstances under which the plaintiff built it, indicate his intention to make it a part of the land, which, at that time, he contemplated becoming the owner of. For these reasons we think he is not entitled to recover, and that the rule must be made absolute to reduce the verdict by the sum of $131.

Judgment Accordingly.

1873.
June.

GUTHRIE *v.* SNELLING.

Insolvent Confined Debtor—Where order for support under 1 *R. S., c.* 124, § 1, *made by County Court Judge, whether discharge can be granted by Judge of Supreme Court—Prohibition.*

Where an order for support under the "Insolvent Confined Debtor's" Act, 1 R. S. c. 124, is made by a Judge of a County Court, a Judge of the Supreme Court has no jurisdiction to order his discharge for non-payment of the weekly allowance.

On a former day of this term, *A. L. Palmer, Q.C.*, on behalf of the plaintiff, moved to set aside an order of WETMORE, J., discharging defendant out of custody under the 1 Rev. Stat. c. 124, "of Insolvent Confined Debtors." An order for the defendant's support was made

[1] L. R. 7 C. P. 328.

1873.

GUTHRIE v. SNELLING.

under the first section of the Act by the Judge of the Saint John County Court, and an application was subsequently made to WETMORE, J., for the defendant's discharge, by reason of the non-payment or tender of the weekly allowance. (*Per Curiam.* No order has yet been made, therefore your application must fail.) Then I apply for a Prohibition to prevent the Judge making the order for want of jurisdiction. The question is whether—the order for support having been made by a County Court Judge under the 1 Rev. Stat. p. 311, § 1, and 30 Vict. c. 10, § 31—an order for discharge can be made by a Judge of the Supreme Court. *Jones* v. *Fletcher*[1] was cited.

Cur. Adv. Vult.

The following opinions were now delivered:

RITCHIE, C.J. I think a Judge of the Supreme Court has no jurisdiction to discharge a debtor for non-payment of a weekly allowance ordered by a County Court Judge: *Jones* v. *Fletcher.*

ALLEN and WELDON, J.J., concurred.

WETMORE, J., dissented, being still of opinion that he had the power to make the order of discharge.

Rule for Prohibition.

BURKE *v.* NILES.

1873.

June.

Costs—Nolle prosequi—Where entered after verdict in plaintiff's favor.

Declaration contained two counts, on both of which plaintiff obtained a verdict, but afterwards entered a *nol. pros.* on one count. Held, defendant not entitled to costs of trial of the issue on that count.

Declaration contained two counts, the first being for trespass *quare clausum fregit*, and the second for assault. Defendant pleaded the general issue, and gave special notice of defence. On the trial plaintiff obtained a verdict on both counts; but on motion for a new trial the verdict upon the count for assault was allowed to stand, and plaintiff entered a *nolle prosequi* on the first count. In taxing defendant his costs, the Clerk allowed the costs of the trial of the issue upon that count, and on June 26, *Fraser* moved to review the taxation.

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[1] 4 All. 550.

1873.

BURKE v. NILES.

This case is in the same position as if the Court had granted a new trial, and the plaintiff had then entered a *nolle prosequi* on the first count, and gone to trial on the count for assault. The defendant is not entitled to costs on issues found for the plaintiff, on which he afterwards enters a *nol. pros.* I admit the defendant would be entitled to some costs, his notices of defence, etc.; but not to costs of the trial, which was abortive as to that count.

A. L. Palmer, Q.C., contra, contended that there had been no abortive trial.

RITCHIE, C.J. As to this count the trial was abortive. It may be hard on the defendant; but I cannot find any case where a defendant has been allowed costs of issues on which he has not succeeded.

WELDON and WETMORE, J.J., concurred.

ALLEN, J. I should like to have considered the matter further before deciding this question, as I am not prepared to say whether the defendant is entitled to the costs or not.

Rule absolute to review taxation.

SUPREME COURT.

MICHAELMAS TERM, 36 VICTORIA, A.D. 1872.

GENERAL RULES.

It is ordered, That the Clerks of the Circuits shall not hereafter enter any cause on the Docket at Nisi Prius, unless the Nisi Prius Record is regularly and properly made up, and duly filed with the Clerk at the time of the entry, and that after being so filed, no such Record shall be altered or taken off the files during the Circuit without leave of the Court.

TRINITY TERM, 36th Victoria.

NO venue shall be changed (unless by consent of parties) without the special order of the Court, or a Judge, founded upon a rule nisi or summons.

W. J. RITCHIE,
JOHN C. ALLEN,
J. W. WELDON,
CHARLES FISHER,
A. R. WETMORE.

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